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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 74-65

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re BUFFALO TELEVENTS, INC., BUFFALO, WYO. Request for Order To Show Cause	CSC-22 WYO08

MEMORANDUM OPINION AND ORDER

(Adopted January 23, 1974; Released January 29, 1974)

BY THE COMMISSION:

1. On August 28, 1972, Harriscope Broadcasting Corporation, licensee of Station KTWO-TV, Casper, Wyoming, filed a "Request for Cease and Desist Order" directed against Buffalo Televents, Inc., operator of a cable television system at Buffalo, Wyoming. On September 22, 1972, Televents filed its Opposition and on October 12, 1972, Harriscope replied. The Petition alleges that Televents violated Section 76.57 of the Commission's Rules[1] by discontinuing carriage of Station KTWO-TV in reprisal for Harriscope's filing against it a "Request for Cease and Desist Order and Petition to Deny Application for Certificate of Compliance" in another proceeding.[2]

2. Televents operates a cable television system with approximately 687 subscribers in a community located wholly outside all television markets, and carries the following television signals:

KUTV (NBC)	Salt Lake City, Utah.
KSL-TV (CBS)	Do.
KCPX-TV (ABC)	Do.
KUED (Educational)	Do.
KTWO-TV (NBC, ABC, CBS)	Casper, Wyo.
KHSD-TV (NBC, ABC)	Lead, S. Dak.

[1] § 76.57 Provisions for systems operating in communities located outside of all major and smaller television markets.

A cable television system operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5, shall carry television broadcast signals in accordance with the following provisions:

(a) Any such cable television system may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(2) Television translator stations with 100 watts or higher power serving the community of the system and, as to cable systems that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the system. In addition, any cable system may elect to carry the signal of any noncommercial educational translator station;

(3) Noncommercial educational television broadcast stations within whose specified zone the community of the system is located, in whole or in part;

(4) Commercial television broadcast stations that are significantly viewed in the community of the system. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such cable television system may carry any additional television signals.

[2] *Buffalo Televents, Inc.*, FCC 73-1004, 42 FCC 2d 1025.

104-024—74——1

No station places a predicted Grade B contour over Buffalo, and only KTWO–TV is designated "significantly viewed".[3]

3. Harriscope alleges that on August 13, 1972, and on several days before, Televents failed to carry KTWO–TV. This allegation is uncontroverted; however, Televents (which supports its position with an affidavit by its system manager) states that at approximately the time of the alleged suspension the Buffalo TV Association relocated its translator station, and that reactivation caused substandard and inconsistent reception of certain signals including KTWO–TV. Moreover, due to signal interference resulting from the addition of two translator signals, Televents was forced to transfer KTWO–TV to another channel. Televents claims that it made every effort to continue proper reception even though it was unaware of the impending translator modification. Harriscope's pleadings contain no evidence of willful disruption nor have they been supplemented to allege a course of conduct designed to deny reception to subscribers. Based on the proximity of the alleged harassment to the modifications, as well as the fact that there have been no assertions of further difficulties, we are satisfied that the claim lacks merit.

In view of the foregoing, the Commission finds that the issuance of the requested Order to Show Cause would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Request for Cease and Desist Order" filed August 28, 1972, by Harriscope Broadcasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[3] Appendix B, *Memorandum Order and Opinion on Reconsideration of Cable Television Report and Order,* FCC 72–530, 36 FCC 2d 326.

F.C.C. 74-63

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CENTURY CABLE COMMUNICATIONS, INC., Owosso, Mich.	CAC-1914 MI175
CENTURY CABLE COMMUNICATIONS, INC., Owosso Township, Mich.	CAC-1915 MI176
CENTURY CABLE COMMUNICATIONS, INC., Corunna, Mich.	CAC-1916 MI177
CENTURY CABLE COMMUNICATIONS, INC., Caledonia Township, Mich.	CAC-1917 MI178
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted January 23, 1974; Released January 30, 1974)

BY THE COMMISSION:

1. Century Cable Communications, Inc., proposed operator of new cable television systems at Owosso, Owosso Township, Corunna, and Caledonia Township, Michigan, located within the Flint-Bay City-Saginaw, Michigan (#61), and Lansing-Onondaga, Michigan (#92), major television markets, has filed applications for certificates of compliance, pursuant to Sections 76.11(a) and 76.13(b) of the Commission's Rules.[1] These applications are unopposed. Century proposes to carry the following television broadcast signals:

WJIM-TV (CBS, Channel 6)	Lansing, Mich.
WILX-TV (NBC, Channel 10)	Onondaga, Mich.
WKAR-TV (Educational, Channel 23)	East Lansing, Mich.
WJRT-TV (ABC, Channel 12)	Flint, Mich.
WEYI-TV (CBS, Channel 25)	Saginaw, Mich.
WNEM-TV (NBC, Channel 5)	Bay City, Mich.
WKBD-TV (Independent, Channel 50)	Detroit, Mich.
CKLW-TV (Independent, Channel 9)	Windsor, Ontario, Canada.

Carriage of these signals is consistent with Section 76.63 of the Commission's Rules.

2. Century requests a waiver of Section 76.251 of our Rules to allow it to provide one public access channel, one education access channel,[2] one local government access channel, and one leased access channel to serve the four communities. In support of this request Century argues

[1] The populations of the communities are: Owosso, 17,179; Owosso Township, 4,002; Corunna, 2,829; Caledonia Township, 4,292. The proposed cable systems will have 30-channel capacities. Of these channels, eight are to be used for television broadcast signal carriage and four for access cablecasting.

[2] There are only two school districts serving the communities. The Owosso school district also serves Owosso Township; the Corunna school district also serves Caledonia Township.

that composite access channels not only would eliminate the necessity for subscribers to use a channel converter to view the access programs, but also would provide the most efficient utilization of the channel capacity while access demand develops. It adds that the relatively small communities [3] are close both geographically and through common interests of the residents.

3. We acknowledged in Paragraphs 147 and 148 of the Cable *Television Report and Order*, FCC 72–108, 36 FCC 2d 143, that there would be situations in which our access requirements would impose an "undue burden" and a waiver would be appropriate. We are satisfied that the small size of three of the four communities involved here justifies the requested partial waiver of Section 76.251 to allow Century to provide one set of access channels at this time rather than a separate set for each community.[4] However, should sufficient demand develop, we expect Century to make additional channels available. We note that it is proposing to install sufficient channel capacity to allow it to satisfy access requirements of all four systems.

4. General's Owosso franchise, granted December 20, 1971, and amended December 15, 1972, and its Caledonia Township franchise, granted April 3, 1972, and amended July 10, 1972, and November 6, 1972, fully comply with the standards of Section 76.31 of the Commission's Rules. The Owosso Township franchise, awarded March 14, 1972, and amended November 14, 1972, is in full compliance with Section 76.31 of the Rules, except that it contains no provisions establishing that the franchise was awarded at a full public proceeding, requiring a local business office and a procedure for resolution of service complaints, or requiring modifications of Section 76.31 to be incorporated into the franchise within one year of the adoption of such modifications. The Township has assured us that the franchise was issued after a full public proceeding.

The applicant will maintain a local office, it has established a complaint procedure, and it will seek any modifications necessary to bring the franchise into full compliance with the standards of Section 76.31. The Corunna franchise, awarded March 1, 1972, and amended June 5, 1972, is in full compliance with Section 76.31 except that it would allow Century to raise the rates 10 percent every two years without a public proceeding. Only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, and, measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10, *recons. denied*, FCC 73–293, 40 FCC 2d 493, we find that these franchises substantially comply with Section 76.31 of the Rules in a manner sufficient to justify a grant of the Owosso Township and Corunna applications until March 31, 1977. The Owosso and Caledonia Township applications will be granted until January 9, 1987, and November 3, 1987, respectively.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.251 of the Rules and grant of the above-captioned applications would be consistent with the public interest.

---

[3] Owosso, Owosso Township, Corunna, and Caledonia Township have only 4,337, 554, 120, and 300 homes respectively, a total of 5,311 homes.
[4] See *Stark County Communications, Inc.*, FCC 72–1189, 38 FCC 2d 1147.

Accordingly, IT IS ORDERED, That Century Cable Communications, Inc.'s request for partial waiver of Section 76.251 of the Commission's Rules IS GRANTED.

IT IS FURTHER ORDERED, That the above-captioned applications for certificates of compliance (CAC–1914, 1915, 1916, and 1917), filed by Century Cable Communications, Inc., ARE GRANTED, and the appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

44 F.C.C. 2d

F.C.C. 74–59

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON D.C. 20554

In the Matter of
AMENDMENT OF SECTION 0.371 OF THE RULES AND REGULATIONS, DELEGATIONS OF AUTHORITY TO THE CHIEF, OFFICE OF OPINIONS AND REVIEW

ORDER

(Adopted January 23, 1974; Released January 29, 1974)

BY THE COMMISSION:

1. The Commission has determined that the Chief, Office of Opinions and Review, should be authorized to act on petitions for leave to amend applications in hearing status pending before the Commission where no objection is raised as to the acceptance of the amendment. The delegation of this function to the Chief, Office of Opinions and Review, which will not involve any determination as to the effect of such amendments, will contribute to the proper functioning of the Commission and to the prompt and orderly conduct of its business.

2. Authority for this amendment is contained in Sections 4(i) and (j), 5(d), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154 (i) and (j), 155(d), and 303(r). Because the amendment relates to matters of procedure and internal organization, the procedural and effective date provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. 553, are inapplicable.

3. Accordingly, IT IS ORDERED, That effective February 5, 1974, Section 0.371 of the Rules and Regulations IS AMENDED as set forth in the Appendix attached hereto.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

APPENDIX

In Part 0 of Chapter I of Title 47 of the Code of Federal Regulations, Section 0.371(g) is added to read as follows:

§ 0.371 Authority Delegated.

* * * * * * *

(g) petitions for leave to amend applications where no objection is raised to the acceptance of the amendment.

F.C.C. 73-1232

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ACCURACY IN MEDIA, INC., AGAINST NATIONAL BROADCASTING CO., INC.

MEMORANDUM OPINION AND ORDER

(Adopted November 26, 1973; Released December 3, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN AND REID CONCURRING IN THE RESULT, COMMISSIONERS JOHNSON AND H. REX LEE ABSENT.

1. The Commission has before it (1) an Application for Review filed by National Broadcasting Company, Inc. (NBC) on June 21, 1973, pursuant to Section 1.115(d) of the Commission's Rules and Regulations which seeks review of the Broadcast Bureau's ruling of May 2, 1973 on the fairness doctrine complaint of Accuracy in Media, Inc. (AIM) concerning the program "Pensions: The Broken Promise" broadcast by the NBC Television Network on September 12, 1972; (2) an opposition to the Application for Review filed by AIM on July 6, 1973; and (3) a reply to the opposition filed by NBC on July 16, 1973.[1]

2. The pleadings of the parties which were before the Bureau are fully set forth in its ruling, 40 FCC 2d 958 (1973), and need not be repeated here. The Bureau ruled, *inter alia*, that NBC's judgment that the "Pensions" program only addressed "some of the problems involved in some private pension plans" was unreasonable; that the program did in fact present views advocating one side of a controversial issue of public importance concerning the overall performance of the private pension system and the need for governmental regulation of all private pension plans; and that NBC had not afforded reasonable opportunity for the presentation of contrasting views, nor expressed any intention of doing so in accordance with its obligations under the fairness doctrine. The Bureau therefore requested NBC to advise the Commission as to how it would meet its fairness obligations.

THE APPLICATION FOR REVIEW

3. In seeking reversal of the staff's ruling, NBC submits that the Bureau's decision "misconstrued the nature of the program involved,"

[1] The Commission has also given leave for the filing of the following pleadings for its consideration: Comments on NBC's reply to its opposition filed by AIM on July 20, 1973; Comments in support of the Application for Review filed by Radio Television News Directors Association on July 16, 1973, Columbia Broadcasting System, Inc. (CBS) on July 23, 1973, and National Association of Broadcasters on August 10, 1973; and a reply to the CBS comments filed by AIM on July 27, 1973. The Commission has reviewed these additional comments and believes that the matters and issues which they discuss have been fully raised by the pleadings of the immediate parties indicated above, and need not be commented upon individually.

and "is utterly inconsistent with basic, firmly rooted fairness doctrine principles . . . [and] with the First Amendment itself." NBC states that under established Commission practice, "determination as to what issue has been the basic subject considered in a program, and whether the licensee has presented balanced coverage of that issue, are matters on which the licensee's judgment must be upheld unless clearly unreasonable or in bad faith." NBC contends that it has made a "concededly good faith" and "plainly reasonable" judgment that the "Pensions" program "dealt not with the 'overall performance' of the private pension system, but rather with some problems of some pension plans." In its description of the program, NBC states that "Pensions" dealt with the pitfalls and failures of some private pension plans" and "presented, among other things, case histories of workers who . . . lost their pension benefits by the failure of the company, its absorption by a conglomerate, or simply by an incompetent management or the quirk of an incomprehensible contract"; and that "While dealing exclusively with such subjects, the program did provide a framework within which the problem could be examined by indicating clearly that there were many private pension plans that worked satisfactorily . . ." NBC concludes its characterization of the program as follows:

> The "Pensions" program did not deal with the question of what percentage of pension plans fail to perform as expected. Nor did it say, expressly or by implication, that most plans do not perform as expected. It did not discuss what legislative or other remedial action may, or should, be taken. It did not say that the private pension system should be changed or eliminated. It was investigative journalism, focusing on and exposing to public view a significant social problem, and it did not offer answers to that problem.

4. NBC states that the reasonableness of the its judgment as to the subject matter of the program is supported by submitted affidavits of its producers, Messrs. Reuven Frank and David Schmerler. In his affidavit Mr. Frank states that in deciding upon the subjects for the 1972–1973 "NBC Reports" series of hour-long news documentaries, NBC became interested in "the problem of those private pension plans which, in fact, failed to provide the promised pensions," such interest initially resulting from "hearings of the Senate Labor Committee into the subject and subsequently written reports in such publications as 'Fortune' magazine"; and that it was decided that this subject should be dealt with in the first "NBC Report" for the 1972–73 season. Mr. Schmerler states in his affidavit that he was asked "to write and produce a documentary with respect to the problems caused by the failure of many private pension plans to pay the money promised by them," and that "preliminary research had disclosed . . . that the problem was a continuing one . . ." NBC has also submitted a compilation of "descriptions of the program" contained in various newspaper and magazine reviews of the "Pensions" documentary,[2] and contends that "since so many independent viewers of the program concluded—as did NBC—that its subject was . . . a 'tough study of the failures of some private pension systems' NBC may not, under any standard, be held to have been unreasonable in its decision that that was indeed

[2] This material, as well as all other pleadings in this case, is on file in the Commission's Washington, D.C., office and is available for public inspection.

the subject of its program." NBC further submits that "the result would be the same even if there had been greater diversity among reviewers as to what the 'Pensions' program was about," since "reasonableness" means that "even though there could be disagreement as to what the issue is, if the licensee's judgment is defensible, it may not be rejected."

5. NBC states that "The deviation by the staff from the permissive standards of reasonableness" could lead to "nothing less than administrative chaos"; that "if NBC were required to present a program showing what AIM refers to as successful pension plans in operation . . . , some AIM-of-the-left might well file a fairness complaint saying that the AIM program painted a too 'rosy' picture of pension plans, and claiming that the original 'Pensions' program was too restrained in its treatment of pension plan evils"; and that "Other subjects that might . . . be deemed raised by the program include: how each company and union referred to by name actually treat their employees; when rights under pension plans should vest in the employees; to what extent pension rights should be transferable from one company to another; whether federal legislation should be enacted and, if so, what kind; whether sufficient guidelines or laws exist with respect to the investment of pension funds; whether workers are sufficiently informed as to the nature of the coverage of their pension plans; whether corporations should be required to have pension plans; [and] who should manage funds." NBC submits that "This list . . . indicates that to have a fairness doctrine that is workable in practice as well as in theory, the licensee must be given what we believe the staff decision improperly withholds: the broadest leeway to determine what subjects to consider and what subjects have been considered."

6. NBC also contends that the Bureau's ruling "is inconsistent with the declared purpose of the fairness doctrine . . . to insure that discussion on public issues [will be] uninhibited, robust, and wide-open," and, if upheld, would force broadcasters "to take a bland course rather than a brave one." NBC submits that "the concept in the staff opinion [is] that whenever a social problem is exposed on television, 'balance' must be achieved by including 'positive' material to minimize the nature of the problem," and that this "concept" is "antithetical to the essence of journalism itself." In particular, it cites the following extract from the submitted affidavit of Mr. J. Edward Murray, past president of the America Society of Newspaper Editors:

> . . . it would be commonplace newspaper procedure that if an editor decided that some private pensions are flawed or useless, and published a typical expose to this effect, the expose would simply assume that the majority of private pension plans were more or less in acceptable shape. Otherwise, the forces of both law and business would have corrected so obvious a deficiency. Nevertheless, under the fairness doctrine, as here interpreted, the pension expose would be considered a controversial public issue and the editor told that he should have given a fairer shake to private pension plans in his original expose, and failing that, that he must now run another non-expose presenting the fact that a majority of private pension plans function satisfactorily.
>
> That dictum, that FCC interpretation in the AIM/NBC case, if applied to newspapers, would either destroy the fruits of any investigative reporting, or more than likely, guarantee that no serious investigative reporting would be undertaken in the future.

NBC states that "It is simply no answer to these problems to require NBC to carry yet another pensions program dealing with happy pensioners. The concept of such a program is precisely as unsound journalistically as it would be to require NBC to include more 'positive' material in the 'Pensions' program itself."

7. NBC further states that AIM has attempted to use the staff decision "to threaten NBC affiliates which carried the 'Pensions' program," citing the following excerpts from a letter sent by AIM to NBC's affiliated stations on May 23, 1973:

> **The licensee is responsible for what he broadcasts. If you carried "Pensions: The Broken Promise" and you have not given your audience a program that showed the other side of the issues, you have not fulfilled your obligation under the fairness doctrine.**
>
> **(We are) sure that you are anxious to fulfill that obligation. NBC may wish to challenge the F.C.C. on the fairness doctrine issue, but it is the licensee, not the network, that may have this used against him in any challenge to a license renewal. NBC has an obligation not to play games with your license. We urge you to tell NBC that.**
>
> **AIM intends to enter notice of this fairness doctrine violation in the file of each station that carried "Pensions: The Broken Promise." Please let us know if you did carry this program and if you have broadcast other programs that provided the requisite balance. If we do not hear from you, we shall assume that you carried the pensions program and have not provided any other program to balance it.**

NBC submits that such letter "is, in and of itself, a demonstration of the dangers inherent in the staff opinion."

8. NBC further contends that the staff's "application of the fairness doctrine" is "inconsistent with the First Amendment" and "unconstitutional." While NBC acknowledges that the constitutionality of the fairness doctrine has been upheld in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), and "understands" that the "validity" of *Red Lion* was "reaffirmed" by the decision of the Supreme Court in *Columbia Broadcasting System* v. *Democratic National Committee*, --- U.S. --- (41 U.S.L.W. 4688, 36 L. Ed. 2d 772, May 29, 1973), it submits that "to say the fairness doctrine is constitutional is not . . . to say that each purported application of it is constitutional." NBC states that this case deals with "a licensee's judgment in the presentation of news and news documentaries," and that "In no other area is the need for the broadcast deference to licensee judgment greater, for in no such area are First Amendment interests [of the broadcaster] greater." NBC submits that the Commission and the courts have left broadcasters "broad leeway for professional judgment" in this area of news and documentary presentations; that this discretion "arises from a recognition that to intrude the Commission too deeply into the processes of broadcast journalism would necessarily inhibit the freedom of that journalism"; and that "both the Commission and the courts must give an extremely 'hard look' to any claim that the application of the fairness doctrine—or the imposition of sanctions for alleged failures to comply with it—violates the First Amendment."

9. NBC states that "These factors are all the more compelling when licensees are engaged in investigative journalism," since "If there is a hierarchy within the speech protected by the First Amendment, investigative journalism is surely at its apex." In support of this con-

tention, it cites the importance of the 19th century press exposes of the "Tweed Ring" in New York City, the "Credit Mobilier scandal" involving U.S. Senators and Representatives accused of accepting stock in the company organized to build the Union Pacific Railroad, the "scandals during the Grant administration," including the "Whiskey Ring" and "Navy Department scandal," and more recent press exposes of "Teapot Dome" and "Watergate." It states that "the subject being investigated by such efforts is so often the government itself," and that "To the extent the staff's opinion requires even greater accountability to the government itself, it is simply inconsistent with the 'long history of disassociation' and even antagonism that has characterized the relationship between government and press in our country . . . [and] as such . . . is violative of the First Amendment." In particular, NBC cites the following passage from the opinion of the Court in the recent *Columbia Broadcasting System* case, *supra*, as supporting its First Amendment contentions:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression. 41 U.S.L.W. at 4697, 36 L. Ed. 2d at 796.

NBC submits that "The courts have condemned over the years, not merely governmental action overtly suppressing the expression by the press of particular views, but the subtlest of governmental influences which might mute the press in the slightest degree or discourage it, even minimally, from performing its role"; that "the effect of the staff decision . . . would inhibit television journalism by forcing television reporters to engage in a kind of thinking and practice which has nothing to do with journalism"; and that "it would impose . . . a variety of less obvious sanctions—e.g., the inhibiting effect upon television journalists and producers of being obliged to justify to their superiors and to the Commission the work they have done; the immense amount of time required—time better spent preparing new programming—in preparing a 'defense' to similar charges; the ever present threat to license renewals inherent in such rulings; and the like." NBC concludes that "the essence of the staff ruling is [that] unless NBC is prepared to promise further programming setting forth at still greater length than in 'Pensions' the view that the pension system as a whole is a success, NBC may not broadcast its program examining some problems in private pension plans," and that therefore the ruling is "inconsistent with the most basic precepts of journalism, . . . the fairness doctrine, . . . and the First Amendment itself."

THE OPPOSITION

10. In opposition to the Application for Review, AIM submits that the staff was "correct in concluding that 'Pensions: The Broken Promise' presented views which were broadly critical of the perform-

ance of the entire private pension system and explicitly advocated and supported proposals to regulate the operation of all pension plans"; that the subjects of "portability, vesting, funding, and fiduciary relationship" discussed in the program were the very subjects of regulatory proposals pending in the Congress; and that the concluding remarks of the program's narrator, Mr. Edwin Newman, specifically stated that this was the case. AIM states that NBC's "defense" that the program only addressed some of the problems in some pension plans is "untenable" in light of the many statements presented in the program which emphasized overall pension plan performance and specific proposals for the regulation of all private pension plans. AIM also states that it rejects "the theory that if the broadcaster can find one independent observer who will confirm his description of the program content, the F.C.C. must agree that his definition is reasonable"; that the Commission "must base its findings on its own analysis of the program, taking into account what NBC and the complainant say about it"; and that "The introduction of excerpts from journalistic comments on the program does nothing to assist the Commission in carrying out this responsibility." AIM further submits that the Commission should not "give NBC or any other licensee the sole authority to make the determination as to what subjects have been considered on a program that has been broadcast" because such authority would allow broadcasters "to define away controversial issues of public importance that they have aired in a one-sided way" and thereby avoid their fairness doctrine obligations.

11. AIM also disputes NBC's contention that the effect of the staff ruling is contrary to the fairness doctrine policy of ensuring "uninhibited, robust and wide open" discussion of public issues. Citing several Commission statements of fairness doctrine policy, AIM states that "NBC has a distorted view of the origins of the fairness doctrine if the implication [of its contention] is that the licensee is entitled to use the airwaves to carry an uninhibited presentation of views that he favors to the exclusion of views of others in the community"; and that "contrary to NBC's claim . . . , the legislative history and the court cases show that the purpose of the fairness doctrine was to inhibit broadcasters by requiring that they present a wide range of community views." Noting that the Supreme Court in *Red Lion*, *supra*, observed that the Commission was not powerless to insist that broadcasters fairly cover controversial issues, AIM submits that "If NBC tells the Commission that it is unable to present a vigorous discussion of controversial issues while insuring the presentation of a variety of viewpoints, then the F.C.C. should give serious thought to following the [Court's] suggestion of remedial action."

12. AIM also takes exception with NBC's "view that if it had to be fair and give the facts and arguments on both sides of the pensions controversy, it could not do a good job of investigative reporting." AIM states that this view is that of "advocacy journalism"; that "The practitioners of this brand of journalism think that 'good' journalism is taking sides and rigging your story in order to influence public opinion to support the side that you think to be right"; and that "most responsible journalists reject this concept of 'good' journalism . . .

in either the print or the electronic media." In this regard, AIM submits a copy of an article on the private pension plan controversy appearing in the *Washington Post* as showing that it is "possible for a good journalist to talk about the abuses without omitting to put the matter into perspective and report on the views of those opposed to some of the features of the bill that was then before the Senate." AIM states that by comparison the NBC presentation was "one sided, emotional and uninformative," and that "Advocacy journalism of the type practiced by NBC in the 'Pensions' program and defended by NBC . . . is precisely the kind of journalism that the fairness doctrine should protect the public against."

13. AIM further states that NBC "does not question the constitutionality of the fairness doctrine but . . . asserts that the ruling on 'Pensions' is unconstitutional"; and that this "argument is extremely murky, with no effort to describe wherein this ruling differs from many others than have been made by the Commission in the past." AIM concludes that "We believe the Commission should uphold the staff ruling in the 'Pensions' case."

THE REPLY

14. In reply to AIM's opposition, NBC states that contrary to AIM's submission, the "Pensions" program dealt "only glancingly" with the subjects of portability, vesting, funding and fiduciary relationship. NBC reiterates its contentions that the program was "a broad overview of some of the *problems* involved in some private pension plans," that the program did contain material that placed "the subject matter of the program in focus," and that it "attempted to treat the subject in an evenhanded, accurate and reasonable manner." It states that "No prior submission by NBC has contended that the 'Pensions' program dealt with the 'broad issues of private pension plan performance,' nor does NBC now contend that 'evenhanded treatment' of controversial issues is impossible, nor that the 'Pensions' program was in any sense unfair." NBC also submits that "It is surely untrue for AIM to attribute to NBC the view that 'good journalism is taking sides and rigging your story,' or that 'if it tried to be fair . . . it could not do a good job of investigative reporting'." NBC further states that while AIM suggests that such programs as the "Pensions" documentary should have an "almost 'mathematically' even balance of views," such an approach to fairness has been rejected by both the Commission and the courts.

15. NBC submits that "The critical line in the staff's opinion is the finding that the 'Pensions' program did in fact present views which were broadly critical of the performance of the entire private pension system . . ."; that "The lesson of the staff opinion is apparently that for NBC to have been 'fair' it either should have presented (a) fewer views which were 'broadly critical' or (b) more views which were not so critical"; and that "Never before has an opinion of the Commission intruded so deeply into the very processes of television journalism." Citing various governmental and private studies, reports, and regulatory proposals, NBC states that such "intrusion" "is all the more striking because with respect to the subject of private pensions it

states a truism to conclude that significant problems do exist," and that "This is not what [AIM] refers to as 'brainwashing': it is simply a fact." NBC submits that "There is no documentary dealing with and exposing any social problem to which the reasoning of the staff opinion could not apply"; that "The fairness doctrine has never before been interpreted so as to transform a program dealing with a social problem into one examining, in general terms, the performance of the system in which the problem is found"; that "Any such reading of the doctrine by the Commission could only limit the quality and quantity of investigative journalism on television"; and that such a result would be inconsistent with both the fairness doctrine and the First Amendment.

DISCUSSION

16. Under the fairness doctrine, a broadcaster presenting one side of a controversial issue of public importance is obligated to afford reasonable opportunity for the presentation of contrasting views on that issue in his overall programming. The Commission has repeatedly stated that in applying the fairness doctrine the broadcaster "is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all other facets of such programming." *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598, 599 (1964). Here NBC does not dispute the Bureau's finding that at the time the "Pensions" program was broadcast the overall performance and proposed regulation of the private pension system constituted a controversial issue of public importance within the meaning of the fairness doctrine.[3] Rather, NBC maintains that the "Pensions" program only "dealt with some problems of some pension plans" and that the performance and proposed regulation of the private pension system "was not even the subject of the 'Pensions' program." The basic issue thus presented by the Application for Review is whether the Bureau erred in its ruling that NBC's judgment on these matters was unreasonable. For the reasons which follow, we affirm the Bureau's ruling.

17. As NBC emphasizes, the Commission's role in passing on any complaint under the fairness doctrine is "not to substitute its judgment for that of the licensee . . ., but rather to determine whether the licensee can be said to have acted reasonably and in good faith." *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC at 599. However, while this Commission has consistently recognized and upheld the broadcaster's discretion to make reasonable, good faith judgments as to his

[3] The Bureau based this finding on AIM's uncontradicted submissions that proposals for the regulation of all private pension plans were pending before the Congress and that such proposals were opposed in whole or in part by "various groups and spokesmen including the National Association of Manufacturers, several labor unions, the Chamber of Commerce of the United States, and the Nixon administration." 40 FCC 2d 958, at 967.

fairness doctrine responsibilities, we have also indicated that such discretion is not unlimited:

> In stressing that the licensee has considerable discretion in discharging his fairness obligation, we do not mean to imply that that discretion is absolute . . . [W]e will intervene if the showing establishes that the licensee has acted unreasonably. *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 292 (1970).

As we stated in our Public Notice of July 26, 1963, entitled "Stations' Responsibilities under the Fairness Doctrine as to Controversial Issue Programming":

> In determining compliance with the fairness doctrine the Commission looks to substance rather than to label or form . . . Regardless of label or form, if one viewpoint of a controversial issue of public importance is presented, the licensee is obligated to make a reasonable effort to present the other opposing viewpoint or viewpoints. 40 FCC 571, 572 (1963).

The specific question properly before us here is therefore not whether NBC may reasonably say that the broad, overall "subject" of the "Pensions" program was "some problems in some pension plans," but rather whether the program did in fact present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system.

18. Our review and determination of this question must necessarily rest primarily upon the program itself.[4] The program opened with the announcement, "Tonight NBC reports on Pensions: The Broken Promise" and the following statements by unidentified men and women:

> MAN. I figure I had twenty-three years seniority filled up, possibly last up until I was in my forty year sometime at least before I retired and then to look back and see it all fallen away. Everything that you planned on. Just seems like a waste of time.
>
> WOMAN. There must be thousands maybe millions of them that's getting the same song and dance my husband got. When they reach their time for retirement there is no funds to pay them.
>
> MAN. This man, Hoffa, on there, retired with a one point seven million dollar lump sum pension. And I can't get three hundred dollars a month out of them on there for my retirement.
>
> MAN. Where does all this money go that's been paid into these pensions.
>
> MAN. The pension system is essentially a consumer fraud, a shell game and a hoax. As a matter of fact, when you say it's a consumer fraud, you pay it an undue compliment, because typically you think of consumer frauds in terms of short transactions . . . but with the pension system you really have a long term contract that may run fifty or a hundred years that's designed to guarantee the security of our population. Essentially, you have an insurance contract that can't be relied on. You have an insurance contract that can't be trusted.
>
> MAN. And I think its a terrible thing in this country where men who work forty-five years have to eat yesterday's bread. And I don't want to compete on my old age against other old men on old age running down a supermarket aisle to get dented cans and stale breads. I don't want to look forward to it. So I really have nothing to look forward to at sixty-five.
>
> (Dance music.)

[4] For this reason, NBC's submitted collection of short "descriptions of the program" gleaned from newspaper and magazine reviews cannot be considered substantial factors in our determination here. Such brief and general one-line summaries provide no information as to what particular views on the subject of pensions may have been presented in the one-hour documentary, and hence are of little value in determining the applicability of the fairness doctrine and the validity of the arguments of the parties with respect to the actual substance of the program.

Mr. Edwin Newman's narration began at the Department of Labor office where the annual pension reports required by law are filed:

There is a widely held belief in this country that public disclosure is a good thing that it inhibits misconduct and helps to keep people honest. That's why these files are full of pension plans, private pension plans . . .

The Labor Department has the right to audit them and to a limited extent, where wrongdoing is discovered, the government may prosecute. Also, the reports are available to anybody who asks to see them, but as it works out that is meager protection for the twenty-five million Americans who are in private pension plans.

There are millions of hopes and dreams in these files. If experience is any guide, very many of the hopes will prove to be empty and dreams will be shattered and the rosy promises of happy and secure retirement and a vine covered cottage will prove to be false.

By way of example of the complaints filed with the Department of Labor with respect to the operation of private pension plans, the statements of several men and women were presented, each relating his or her personal experience with a plan which had failed. The program then presented interviews with various public figures who commented on different aspects of the private pension system:

HERBERT DENNENBERG. When you get to be sixty-five, you're out of work and you need a source of money and that's what a pension plan is supposed to do. Unfortunately, it's woefully inadequate. Over half the people have nothing at all from pension plans and those that do typically have only a thousand dollars a year so even if you have social security, most pension funds are inadequate.

* * * * * * *

NEWMAN. Many employees form their ideas about pensions by reading the slick brochures that their company or union gives them. Most of these booklets do make a pension seem a sure thing. The many restrictions and exclusions are buried in fine print or concealed by obscure language.

The Senate Labor Committee has been looking at these brochures as part of its general study of the pension problem. Senator Harrison Williams is chairman of the committee.

Senator WILLIAMS. I have all kinds of descriptions of plans here and all of them just suggest the certainty of an assured benefit upon retirement. Here's a man—this was from a brewery, sitting relaxed with a glass of beer and checks coming out of the air; well, you see, this gives a false hope, a sense of false security.

NEWMAN. Senator, the way private pension plans are set up now, are the premises real?

WILLIAMS. The answer is, they are not.

* * * * * * *

DENNENBERG. It's almost an obstacle course and the miracle is when someone actually collects with the plan. There have been studies that indicate that most people won't collect. I think we need controls of the same type we apply to insurance companies, your money should be funded so it's going to be there at age sixty-five. Today, it's almost a miracle if it's there at age sixty-five. You have to go to work for an employer, you have to stay with him, you have to stay in good health, you have to avoid layoffs, you have to take your money, turn it over to the employer, hope that he invests it safely and soundly, you have to hope that when you're age sixty-five the employer is still around and he's not likely to be in terms of the high mortality of business, so there's almost a sequence of miracles which you're counting on.

The remainder of the one-hour program continued along similar lines. Specific private pension plans which had failed were cited and discussed in interviews with employees involved, the discussion dealing with such matters as the portability and vesting of pension rights, the adequacy of funding and payments upon retirement, and the fiduciary relationship between employees and those who manage the funds.

Interspersed with such discussion of specific plans which had not adequately covered one or more of these particulars were the following general statements:

MAN. I lose faith in a government that allows things like this. Not long ago I was in New York and I saw that inscription on the Statute of Liberty. And it sounded wonderful, you know. Give us your tired and so on. But what it actually said was, give us your labor; get these honkies here where we can put them to work for nothing. That's what it amounted to.

* * * * * * *

VICTOR GOTBAUM. In the United States we have a magnificent ability to cover up our own diseases especially the disease of big business. Pensions in the private area are a mockery. They're a national disgrace. We know this.

* * * * * * *

EDWARD KRAMER. These people feel who worked all their lives and let's say they worked thirty-five, forty years, and many of them have worked for one employer for all these years, are, they feel that now that they've retired, they're going to live a better life . . . And then they find themselves in the position that they have no money, they have no friends. And they live in squalor and they can't do these things. So what—they've really been cheated, cheated by the pension system, cheated by social security, cheated by their employer and they feel very angry at themselves because I think in the back of their mind, they knew this was going to happen. They knew that when the day came that they would retire, they would be worse off than when they were working. But they're afraid to admit it.

* * * * * * *

KRAMER. Going to a movie is a big expense, taking a bus to a clinic to visit a doctor is a big expense, buying a new pair of shoes is a big expense, getting ill and having to get medicine is a big expense. This is where, if there was an adequate pension system in the United States along with social security, some of these problems could be avoided.

* * * * * * *

NEWMAN. Pension funds have outgrown the laws regulating them. No government agency has enough staff or authority to control them . . .

CHARLES RUFF. We have no real idea of how much fraud there may be in the pension plan area. But you're talking about institutions, the pension plan area, generally, that deals in hundreds of billions of dollars. And when you have that much money involved, the federal government ought to take a more active role than it does.

* * * * * * *

DENNENBERG. We regulate insurance completely. We regulate the agent, the contract, reserve, the policies, the sales technique, the investment, we regulate insurance companies from birth to death. And yet we have a gigantic pension system, almost the size of the insurance industry, a hundred and fifty billion dollar business that's essentially unregulated. Can you imagine what would happen if we would let insurance companies do whatever they wanted to? We can't even protect the public with full regulation in insurance, but essentially we have a pension system which is precisely an insurance plan and which is almost unregulated.

Toward the end of the program, the following statements were presented as those of "critics" who recommend "changes" in the private pension system:

RALPH NADER. I think time is running out. On the private pension systems. And its abuses continue to pile up, and if its enormous popular disappointments begin to be more and more revealed, it might collapse of its own weight, and social security will have to take up the slack.

* * * * * * *

RUSSELL HUBBARD. Over a good number of years, the track record is excellent. It's unfortunate that every now and then some of the tragic cases make the news-

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papers and the headlines. But it's a question of perspective and balance. When you consider that there are thirty million people covered by the plans, that there are five million people receiving about seven billion dollars in benefits. I think that's a pretty good record. That's not to say that there aren't a few remaining loopholes that need closing but we ought to make sure that we don't throw out the baby with the wash water.

* * * * * * *

GOTTBAUM. The solutions in the wealthiest country in the world is not do what they've been doing in terms of pensions. You fund a pension. You fund it on the basis of man's ability to live. You tie it into the cost of living. The wealthiest country in the world ought to be able to do it.

* * * * * * *

KENNETH ANDERSON. You must remember that the corporation has set this plan up voluntarily. They have not been required by law to set it up. [Interviewer: So that it gets from the employer to the employee?] That's what it amounts to.

* * * * * * *

DENNENBERG. I say it's the employee's money and I think that is the economic fact of life and I think in terms of the morals of the problem and in terms of the economics of the problem, that anyone would conclude that it does belong to the employee and yet it's not being used for his benefit.

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ANDERSON. These pension plans are a part of a fringe benefit package. Like hospitalization insurance and so forth, but its still a voluntary thing on the part of the corporation.

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GOTTBAUM. So all I can say is my God how can you hold to that view. Do you mean, people are supposed to starve, that people are supposed to live on a subsistence money because they are not unique, and that, by the way is the same attitude that gives top management stock options, gives them retirement after a small serving period whereas the middle worker, the lower economic worker takes a terrible beating.

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Senator SCHWEIKER. What we're proposing to do a little bit what was done with the bank failure problem. We didn't go in and take over the banks but we did, by means of insurance and federal deposit insurance corporation come in and guarantee that no depositor would lose his savings under a certain point. And I think that's what we're saying here, that once a worker has put in eight years time, once he's reached a certain age, once his company's reached a certain point, then he doesn't lose it, regardless of what happens to his company or the country.

* * * * * * *

MAN. What are they waiting for? What the hell are they waiting for? Do they have to give us a certain quota, a certain number of people that have to be victims? Do they have to give us a certain amount of money? How many billions must it take before they do something about this? How many people have to starve? How many people have to lay on the sidelines and just hope and pray. How much misery do they want before they actually act upon it?

Mr. Newman then concluded the program with the following remarks:

This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said.

There are certain technical questions that we've dealt with only glancingly . . . [portability, vesting, funding, and fiduciary relationship]

These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.

> Our own conclusion about all this is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.
> The situation, as we've seen it, is deplorable.

19. This review clearly supports the staff's finding that "The Pensions program . . . did in fact present views which were broadly critical of the performance of the entire private pension system and explicitly advocated and supported proposals to regulate the operation of all private pension plans." 40 FCC 2d at 966. And, as the program itself noted, such views were presented at a time when the Congress was engaged in a study of private pension plans and considering proposed legislation for their regulation—legislation which was opposed in whole or in part by various private and public groups and spokesmen. In its report *In the Matter of Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949), the Commission stated:

> . . . In appraising the record of a station in presenting programs concerning a controversial bill pending before the Congress of the United States, if the record disclosed that the licensee had permitted only advocates of the bill's enactment to utilize its facilities to the exclusion of its opponents, it is clear that no independent appraisal of the bill's merits by the Commission would be required to reach a determination that the licensee had misconstrued its duties and obligations as a person licensed to serve the public interest. *Id.* at 1256; *quoted with approval in New Broadcasting Co.* (WLIB), 6 R.R. 258 (April 12, 1950).

We believe that this principle of fairness is applicable here. Although the "Pensions" program did not specifically identify or advocate passage of any particular bill pending in the Congress, it did present views that existing laws offer only "meager protection," that "pension funds have outgrown the laws regulating them," that "the federal government ought to take a more active role than it does," and that "controls of the same type we apply to insurance companies" are needed. The program also presented the views of two Senators, one denying the validity of the "premises" underlying private pension plans, the other advocating a proposal to guarantee the vesting of pension rights. And throughout the program, the entire private pension system was characterized in such terms as "essentially a consumer fraud, a shell game and a hoax," "woefully inadequate," a "mockery," and a "national disgrace." As the foregoing review of the program illustrates, these examples are by no means exhaustive of the views which were in fact presented and in this regard, we do not believe it inaccurate to cite Mr. Neuman's closing remarks as indicative of the actual scope and substance of the viewpoints broadcast in the "Pensions" program:

> Our own conclusion about all this is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved. *The situation, as we've seen it, is deplorable.* (Emphasis added).

Given these facts and circumstances, we cannot accept as reasonable a judgment that the "Pensions" program did not present views advocating one side of a controversial issue of public importance within the meaning of the fairness doctrine, that issue being the overall performance of the private pension system and the need for governmental regulation of all private pension plans.

20. Our conclusion is not based upon a singling out, "line-by-line" or "statement-by-statement," of isolated expressions of viewpoints, a procedure we rejected in *National Broadcasting Co.*, 25 FCC 2d 735 (1970). Rather it appears to us to be the only conclusion which can be drawn upon review of the program in its entirety, and one which could be avoided only by ignoring a significant and substantial part of the material presented. We note here that in light of the presentation of so many statements sharply criticizing the performance of the entire pension system and strongly recommending the regulation of all private pension plans, it would be an unrealistic oversimplification to characterize the program as one addressing only "some problems of some pension plans." The program did examine such problems, but it would strain the most "permissive standard of reasonableness" past the breaking point to imply that the program was confined to such a limited examination. Indeed, the value of investigative reporting is to raise matters of substantial public interest, and it would be denigrating this high purpose to characterize it in such terms. It is difficult to see why a network would devote its time and effort to a program with no broad impact or value, and we cannot agree that NBC has done so here.

21. Having thus presented viewpoints on one side of the issue of the overall performance and need for regulation of the private pension system,[5] NBC was obligated under the fairness doctrine to afford reasonable opportunity in its overall programming for the presentation of contrasting views. In its response to the staff's inquiry, NBC stated that prior to the "Pensions" program, it had not "telecast any program dealing extensively with private pensions," and that it had formulated no definite plans to present further programming related to the subject of pensions in the future. 40 FCC 2d at 967. Thus, the only NBC programming in which contrasting views might have been presented was the "Pensions" documentary itself. In a footnote to its Application for Review, NBC appears to argue that the program, in any event, did afford a reasonable opportunity for contrasting views in that "There were at least 3 statements on the program that were—by any definition—'pro-pension plan.'" Here it cites the above-quoted statements of Messrs. Russell Hubbard and Kenneth Anderson and Mr. Neuman's concluding remark that there are "many good [pension plans], and there are many people for whom the promise has become a reality." We believe, however, that the staff was correct in its finding that although these statements "could be taken to present a contrasting view, they alone cannot be said to have afforded the reasonable opportunity contemplated by the fairness doctrine when compared to the views presented during the remainder of the program." As we have stated, while "there is no mathematical formula" for achieving fairness, "the sheer weight on one side as against the other" may indicate that no reasonable opportunity has in fact been afforded. *Committee for the Fair Broadcasting of Controversial Issues*, *supra*, at 293. As our review of the program indicates, it is not necessary to apply any

[5] We should also point out that a program examining serious faults in an existing situation can of course present one side of an issue even though no remedial proposal is presented.

"mathematical" formula here to ascertain that the overwhelming weight of the statements presented in the program supported the view that the overall performance of private pension plans was "deplorable" and that the pension system should be regulated to rectify that situation, and that the "pro-pension" statements cited by NBC were insufficient in either number or substance to constitute a reasonable opportunity for the presentation of an opposing viewpoint. The staff, therefore, properly requested NBC to advise the Commission as to how it intended to meet its obligation under the fairness doctrine to afford such opportunity.

22. NBC broadly contends that any affirmance of the Bureau's ruling by the Commission would be "inconsistent with the declared purpose of the fairness doctrine" to insure an "uninhibited, robust, and wide open" discussion of public issues and would lead broadcasters "to take a bland course rather than a brave one." In support of this conclusion, NBC submits that the "concept" and "essence" of the staff's decision is that "whenever a social problem is exposed . . . , 'balance' must be achieved by including 'positive' material to minimize the nature of the problem" and that "unless NBC is prepared to promise further programming setting forth at still greater length than in 'Pensions' the view that the pension system as a whole is a successs, NBC may not broadcast its program examining some problems in private pension plans." Such a result, NBC claims, would be "antithetical to the essence of journalism itself" and would place the Commission at "the center of the journalistic process." We cannot agree. First of all, NBC should understand that our fairness doctrine ruling indicates no Commission view as to the merits of the program, and certainly no suggestion that this particular program was in any sense flawed or improper. We have previously stated our recognition of the value of investigative reporting and our steadfast intention to do nothing to interfere with or inhibit it. See *WBBM–TV*, 18 FCC 2d 124, 134 (1969): *Hunger in America*, 20 FCC 2d 143, 150 (1969). However, while NBC is to be commnded for airing such an "uninhibited, robust, and wide open" presentation of one side of the pensions issue, we cannot sanction its reluctance to afford a reasonable opportunity for opposing viewpoints to be heard. This is the crux of the matter. The issue is not whether NBC or any other licensee or network is free to deal with an issue as it sees fit, but whether it may constitutionally be required to present the views of others who may see the issue from a different perspective. This issue has been decided adversely to NBC's present position in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), unless for some particular reason the effect of our ruling in this case is to impair NBC's capacity to pursue its journalistic function.[6]

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[6] As the Commission stated in its report *In the Matter of Editorializing by Broadcast Licensees, supra:*

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the dissemination of news and ideas concerning the vital issues of the day . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community . . . *And we have recognized, with respect to such programs, the paramount right of the public to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning those vital and often controversial issues which are held by the various groups which make up the community. Id.* at 1249. [Emphasis added.]

23. NBC does not dispute that there are many private and public groups and spokesmen who oppose the view that the overall performance of the private pension system is so "deplorable" as to require remedial legislation. And we see no impediment to affording the public a reasonable opportunity to be informed of those opposing viewpoints and to weigh their merit. As we have often stated, the opposing views need not be presented in the same program; there is thus no basis for any claim that our ruling makes impossible the sort of program NBC has already presented. NBC was free to determine format, spokesmen, time, and similar matters, as it thought best. We are unable to understand what prevented it from affording a further opportunity to those with differing views, aside from a reluctance to make more time available. Any such reluctance of course would not be a valid reason under the fairness doctrine nor a basis for a claim of intrusion upon its right of free expression. That is a cardinal teaching of the Supreme Court's affirmance of the fairness doctrine which may not yet be fully understood.[7]

24. Furthermore, neither the staff's ruling nor our affirmance of its decision here holds that NBC must now produce and broadcast another one-hour documentary "dealing with happy pensioners" or portraying the pension system as "a success." As we have stated, NBC's obligation is to afford a reasonable opportunity in its overall programming for the public to be informed as to the *views* of groups or individual spokesmen opposed to the viewpoint that the private pension system has performed poorly and should be regulated. Just as NBC was not required to present those views in its "Pensions" documentary, it is not now required to present them in any particular program or format. There is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented and the appropriate spokesmen and format for their presentation are left to NBC's discretion subject only to a standard of reasonableness and good faith. We note in this regard that NBC cites a long list of subjects concerning the vesting and portability of pension rights, the adequacy of plan funding and payments upon retirement, and the fiduciary relationship in pension plan management, and claims that under the staff's analysis and ruling each of these might be considered a distinct controversial issue of public importance entitled to separate treatment under the fairness doctrine. However, neither the staff's ruling nor our decision here gives grounds for such an overly-broad interpretation. While each of the subjects cited is an aspect of overall pension plan performance, there is no information before the

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[7] See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969):

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. 395 U.S. at 388.
>
> • • • • • • •
>
> (T)he First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use. 395 U.S. at 391.
>
> • • • • • • •
>
> There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." 395 U.S. at 392 (Citation omitted).

Commission to indicate that these subjects are by themselves independent controversial issues of public importance. NBC may very well consider these subjects in determining what contrasting viewpoints to present on the overall issue of the performance and need for regulation of private pension plans, but the applicability of the fairness doctrine to that issue does not require their wholly separate treatment or discussion. See *National Broadcasting Co., supra*, at 736–37. Under these circumstances we can see no merit in NBC's argument that the ruling in this case is inconsistent with either the purpose of the fairness doctrine or the journalistic discretion afforded the broadcaster in determining how to comply with his fairness obligations.

25. Little more need be said with respect to NBC's contention that this particular application of the fairness doctrine marks an unwarranted intrusion into the journalistic process or is in any way violative of broadcaster prerogatives protected by the First Amendment. While we have consistently recognized the journalistic discretion afforded licensees under our system of broadcasting and the need for Commission deference to licensee judgments in matters concerning their news and news documentary programs, we cannot uphold a patently unreasonable exercise of that discretion which would deny the right of the public to be informed as to both sides of a controversial issue which in fact has been presented by such programming. As the Supreme Court stated in affirming the constitutionality of the fairness doctrine:

> The people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment . . . *It is the right of the viewers and listeners, not the broadcasters, which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by government itself or a private licensee . . . *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1968) [Emphasis added].

If the broadcaster's First Amendment interest in freedom of journalistic expression is greatest in the area of the presentation of news and news documentaries, then the right of the public to have access to the various competing viewpoints on controversial issues discussed in such presentations is certainly no less compelling. News and news documentaries usually treat of public affairs, and for this reason perhaps no other vehicles of broadcast speech should function more consistently with the First Amendment's purpose of fostering "uninhibited, robust, and wide open" debate with respect to the public issues which they present and discuss. NBC has a journalist's role; it has an additional role as a public trustee of providing a forum for diverse views on public issues. The two roles are not incompatible.

26. We note NBC's reliance on the recent decision of the Supreme Court in *Columbia Broadcasting System* v. *Democratic National Committee*, ___ U.S. ___, 36 L. Ed. 2d 772 (1973) which held that neither the public interest standard nor the First Amendment requires broadcasters to sell commercial time to persons wishing to discuss controversial issues. Although NBC cites the Court's affirmation of licensee discretion in the selection and choice of broadcast material as controlling the questions presented here, *see* ___ U.S. ___, 36 L. Ed. 2d at 796 (1973), there is nothing in the Court's opinion to suggest that such

journalistic discretion relieves the broadcaster of his obligation to the public to cover fairly those issues which he in fact presents. To the contrary, the Court emphasized that concentrating the "allocation of journalistic priorities" in the licensee "gives the public some assurance that the broadcaster will be answerable if he fails to meet their legitimate needs," ___ U.S. at ___. 36 L. Ed. 2d at 796. Similarly, in rejecting the contention that "the Fairness Doctrine permits broadcasters to preside over a 'paternalistic' regime," the Court stated:

> That doctrine admittedly has not always brought to the public perfect or indeed even consistently high quality treatment of all public events and issues; *but the remedy does not lie in diluting licensee responsibility* . . . [W]hile the licensee has discretion in fulfilling his obligations under the Fairness Doctrine, he is required to "present representative community views and voices on controversial issues which are of importance to his listeners." ___ U.S. ___ 36 L. Ed. 2d at 799–800 [Emphasis added]

We therefore can see no valid First Amendment ground for allowing the private journalistic interests of licensees to destroy their public obligation to afford a reasonable opportunity for the presentation of contrasting views on controversial issues raised in news and news documentaries. As the Court held in its decision in *Red Lion*, *supra*:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or a fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. 395 U.S. 367, 389.

We have discussed these matters at length, and perhaps somewhat repetitiously, because, although not novel, they are important and we wish to be perfectly clear, to the end that licensees will feel no improper constraint but will be reminded of their legal obligations.

27. One further matter deserves attention here. Information before the Commission indicates that pending our review of the Bureau's ruling in this matter, AIM sent correspondence to NBC affiliates stating that it would enter notice of the staff's finding in the renewal file of each station carrying the "Pensions" program and requesting that it be advised as to whether or not the affiliate had broadcast the program, and, if so, what it had presented to comply with its fairness obligations. AIM should be advised that while licensees remain ultimately responsible for the programming which they carry, the Commission has held that they may initially look to network action for compliance with broadcast obligations originating with network programming. See *Blair Clark*, 11 FCC 2d 511 (1968). More importantly, AIM should note that under the Commission's Rules and Regulations a party adversely affected by a staff ruling issued pursuant to delegated authority may seek review of that ruling by the full Commission as a matter of right. See 47 C.F.R. Sec. 1.115.

28. Accordingly, IT IS ORDERED, That NBC's Application for Review IS DENIED. It is further ordered that NBC submit a statement within 20 days of the date of this decision indicating how it intends to fulfill its fairness doctrine obligations in accordance with this opinion.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-57

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ACCURACY IN MEDIA, INC., AGAINST NATIONAL BROADCASTING CO., INC.

ORDER

(Adopted January 23, 1974; Released January 23, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING.

1. National Broadcasting Company, Inc. (NBC) has filed an application for a stay pending judicial review of our *Memorandum Opinion and Order*, FCC 73-1232, adopted November 26, 1973 and released December 3, 1973. That order directed NBC to submit a statement indicating how it intended to fulfill fairness doctrine obligations arising out of the broadcast of the documentary "Pensions: The Broken Promise."

2. In support of its application for a stay, NBC suggests that its appeal "raises novel and substantial questions of the highest statutory and constitutional import," and that denial of a stay would result in "the total and irreparable loss to NBC—and, we believe, the public—of rights we believe are threatened by the Memorandum Opinion and Order." NBC states that if a stay is granted it will agree to an expedited briefing schedule in the Court of Appeals.

3. In the circumstances of this case, we believe that it would be a disservice to the public to permit NBC to delay further in fulfilling its fairness obligations concerning the pensions issue. As we stated in our January 9, 1974 letter to NBC, "the legislative process concerning pension reform appears to be in an active stage, with the possibility that final action by Congress could be taken this spring . . . ." NBC has presented us with nothing which would indicate that this appraisal of the status of the legislation is inaccurate. If we were to permit a stay in these circumstances, it is entirely possible that NBC would continue to avoid its fairness obligations while the Congress proceeded toward final resolution of the pensions issue. Furthermore, we are not persuaded that this problem would be eliminated by the expedited briefing schedule suggested by NBC. Consequently, we believe that further delay in presenting the contrasting viewpoint would be inconsistent with "the paramount right of the public to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning those vital and often controversial issues which are held by the various groups which make up the community." *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1249 (1949). In this regard, it is important to keep in mind the fact that

"the essential basis for any fairness doctrine, no matter with what specificity the standards are defined, is that *the American public must not be left uninformed.*" *Green* v. *FCC*, 144 U.S. App. D.C. 353, 359, 447 F.2d 323, 329 (1971) (emphasis in the original).

4. We do not agree with NBC that the case presents novel questions of statutory and constitutional import. We have already pointed out that the issue "is not whether NBC or any other licensee or network is free to deal with the issue as it sees fit, but whether it may constitutionally be required to present the views of others who may see this issue from a different perspective." *Memorandum Opinion and Order*, FCC 73–1232, p. 20. This issue is not a novel one. It has been squarely resolved by the Supreme Court in the following terms: "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 389 (1969).

5. While NBC has not presented adequate grounds to justify the grant of a stay *pendente lite*, we will grant a temporary stay to enable NBC to seek a judicial stay.

6. Accordingly, IT IS ORDERED, That the effectiveness of our *Memorandum Opinion and Order*, FCC 73–1232, IS STAYED for a period of seven days from the release date of this Order; and if within said seven day period, NBC applies for a judicial stay *pendente lite*, the effectiveness of the said *Memorandum Opinion and Order* SHALL BE FURTHER STAYED until the reviewing court acts upon the motion for stay.

7. IT IS FURTHER ORDERED, That in all other respects the request for a stay pending judicial review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (COLORADO SPRINGS AND PUEBLO, COLO.)	Docket No. 19644 RM–1886 RM–2018

REPORT AND ORDER

(Proceeding Terminated)

(Adopted: January 23, 1974; Released January 29, 1974)

BY THE COMMISSION:

1. The Commission here considers the Notice of Proposed Rule Making and Order to Show Cause, adopted December 6, 1972 (FCC 72–1111; 37 Fed. Reg. 26740), proposing amendment of the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) by substituting Channel 230 for Channel 232A to Colorado Springs, Colorado, as petitioned for by Western Broadcasting Company (Western), licensee of Stations KPIK (AM daytime-only) and KPIK–FM (Channel 232A), there (RM–1886). Western also requested modification of the license of Station KPIK–FM to specify operation on Channel 230. The only change needed to allow the assignment of Channel 230 to Colorado Springs is the deletion of the Channel 232A assignment there. Also before us is the petition of KYSN Broadcasting Company (KYSN), licensee of AM Station KYSN, Colorado Springs, Colorado, to reassign Channel 260 to that city from Pueblo, Colorado (RM–2018), which Report No. 846, dated December 22, 1972 (Public Notice), stated would be treated as a "counter-proposal" in this proceeding.

2. Parties filing comments and/or reply comments are: Western; KYSN; Roger P. Brandt (Brandt), licensee of AM Station KDZA (Class IV), Pueblo, Colorado, and now the applicant for Channel 264 there (BPH–8454); and Quixote Broadcasting Co. (Quixote), licensee of AM Station KPUB (daytime-only), Pueblo, Colorado, and applicant for Channel 260 there (BPH–7885).[1] Also before us for consideration is the request of KYSN for leave to file supplemental comments directed at implications of Quixote's amendment to its

[1] At the time, Quixote's application specified the transmitter site at KPUB's transmitter, but it has been amended to specify a site on Cheyenne Mountain. Quixote's application originally specified Channel 250; American Radio Corporation has since applied for that channel (BPH–8323). Both American Radio and Brandt propose to operate from the antenna (located eight miles northeast of Pueblo) of Stations KOAA–TV and KTSC–TV, Channels 5 and *8, respectively, assigned to Pueblo and operating with dual city identifications as "Pueblo-Colorado Springs"; see fn. 4, below, as concerns the similar type of operation by the stations on two of Colorado Springs' television channels.

application for Channel 260 to specify a Cheyenne Mountain transmitter site.

3. Both Western and KYSN place strong reliance on the population and growth of Colorado Springs, the surrounding urban area, and the Colorado Springs Standard Metropolitan Statistical Area (SMSA). Quixote and Brandt—at least as concerns the proposed reassignment of Channel 260 from Pueblo to Colorado Springs—similarly rely on the population and growth potential of Pueblo and its trade area. Both cities are located roughly in the central eastern part of Colorado; Colorado Springs is about 15 miles east of Pikes Peak, about 60 miles south of Denver, and roughly 40 miles north of Pueblo. Colorado Springs, population 135,060,[2] is the seat of El Paso County, population 235,972, which together with Teller County (population 3,316) constitutes the Colorado Springs SMSA. Pueblo, population 97,453, is the seat of Pueblo County (which is the Pueblo SMSA), population 118,238. The aural broadcast situation at the two cities is as follows: Pueblo has six AM stations (three are daytime-only, and one is a Class IV), four FM channel assignments (one occupied and the other three applied for), and one noncommercial educational FM station (KTSC–FM, licensed to Southern Colorado State College). Colorado Springs has six AM stations (two are daytime-only, and two are Class IV), five commercial FM stations, and two noncommercial educational FM stations (KRCC, licensed to Colorado College, and KEPC licensed to El Paso Community College). Originally, the new FM Table of Assignments included three FM channels for Colorado Springs; the other two were added because of demand, increase of population, and other circumstances (see 40 F.C.C. 826, 828 (1964) and 40 F.C.C. 937, 938 (1965)). Other radio stations licensed to serve communities in El Paso County are KRDI(AM) and KCMS–FM, Channel 274, Manitou Springs (population 4,278), and KWYD, Channel 288A, Security; the latter assignment was also made because of demand based on population growth (32 F.C.C. 2d 308, 312 (1971)).

4. The comments of Western consist of a reaffirmation of its petition for rule making, consent to modification of the license of Station KPIK–FM and a statement that steps will be taken in that respect promptly on authorization by the Commission, and the submission of an engineering statement as to preclusion. The Notice mentioned that Western's petition placed strong reliance on the size and growth factor of Colorado Springs [3] and the aural broadcasting situation there, and

[2] Unless otherwise indicated, all population information is from the 1970 Census.

[3] The population of Colorado Springs and El Paso County increased 92.1% and 64.2%, respectively, in the decade between 1960 and 1970. In 1960, the populations of the city and county (SMSA) were 70,470 and 143,742, respectively. At that time, Pueblo and its county had populations of 91,181 and 118,707. The 1960 Census shows earlier populations as follows:

Census	Colorado Springs	El Paso County	Pueblo	Pueblo County
1950	45,472	74,523	63,685	90,188
1940	36,789	----------	52,162	----------
1930	33,237	----------	50,096	----------

that the petition implied that Western could not compete with the four Class C FM stations at Colorado Springs and Station KCMS–FM, Channel 274, Manitou Springs, which also serves Colorado Springs and surrounding areas.[4] Western also suggested that its proposal would comport with Commission policy as to intermixture of the classes of FM assignments. In reply comments, Western also supports the KYSN proposal to assign Channel 260 to Colorado Springs, but if there is to be a choice, it favors assignment of Channel 230. Thus, it is urged, the Commission not only could correct the intermixture situation at Colorado Springs but add a much needed sixth FM channel. Reassignment of Channel 260, Western says, is warranted because only one of the four Class C channels at Pueblo is occupied (Station KVMN (FM), Channel 255), but if deemed appropriate, Channel 296A could be assigned in its place. Western further argues that the assignment of a sixth Class C FM channel to Colorado Springs comports with the population criteria for assignment of commercial FM channels—here four to six channels for a city of 100,000 to 250,000 population.[5] In the latter respect, Western urges that considering the SMSA population ("in excess of 250,000"), expected growth in the near future, and the population guideline of six to ten channels for communities of 250,000 to 1 million, a sixth channel would be well within the population guidelines for FM channel assignments.

5. With its reply comments, Western has submitted updated information about the present and future of the Colorado Springs SMSA. This includes data about the military community [the Air Force Academy, Fort Carson, and Ent Air Force Base—the headquarters of NORAD (aerospace defense system) at Cheyenne Mountain and headquarters of ARADCOM (U.S. Air Defense Command)]; population growth; tourism; banking; a comparative ranking economically; industrial and educational expansion; and details about the cultural, higher educational, and medical facilities. Western has also adduced technical data showing that the assignment of Channels 230 and 260 to Colorado Springs would have little preclusionary effect.

6. KYSN, in support of its proposal and that of Western has adduced data and information like that of Western as to population, social, and economic characteristics of Colorado Springs and El Paso County, and about preclusion. The supporting engineering report properly shows that the antenna site of Channel 260, if assigned to Colorado Springs, must be located at least five miles south of the Colorado Springs reference point to meet the 65-mile spacing to Denver Stations KVOD (Channel 258) and KLIR–FM (Channel 262). In this respect, KYSN proposes operation from Cheyenne Mountain, about seven miles southwest of Colorado Springs, from which location the

[4] KCMS–FM transmits from Cheyenne Mountain. This also is the transmitter site of aural Stations KKFM(FM), KRDO–FM, and KVOR–FM, and television Stations KKTV and KRDO–TV. The latter—on Colorado Springs Channels 11 and 13—are identified dually as Colorado Springs-Pueblo (see fn. 1, above). The application of Quixote for Channel 260 specifies a Cheyenne Mountain transmitter site. It also appears that a station on Pueblo's Channel 264 could operate from there, although Brandt's application specifies another site (see fn. 1).

[5] See Para. 4 of the Further Notice of Proposed Rule Making in Docket No. 14185, adopted July 25, 1962 (FCC 62–867), and incorporated by reference in Para. 25 of the Third Report, Memorandum Opinion and Order (40 F.C.C. 747, 758 (1963)).

spacings would be met.[6] As already noted, Cheyenne Mountain is the antenna site location of three of Colorado Springs' Class C FM stations, its two television stations,[7] and Station KCMS–FM (Channel 274), Manitou Springs. KYSN also views the assignment of a sixth FM channel to Colorado Springs as being in accord with the population criteria for FM assignments even if we consider only the 1970 Census data for the Colorado Springs Urbanized Area (204,766) and SMSA (239,288). KYSN, however, also calls attention to 152,735 and 262,030 population figures for Colorado Springs and the SMSA reported by the Colorado Springs Chamber of Commerce as of January 1, 1973, which it urges "are at the uppermost end of the * * * 100,000 to 250,000 scale". KYSN endeavors to distinguish this situation from those where we have specifically rejected SMSA population as a basis for channel assignment (see *Albuquerque*, 35 F.C.C. 2d 230 (1972) and *Wilmington*, 35 F.C.C. 2d 735 (1972)). It states that in those instances the number of FM channels assigned to the communities already exceeded the number specified under the population criteria while this is not the situation here. KYSN contends that it should have an equal opportunity to apply for Channel 230, if that is the only assignment made here to Colorado Springs.

7. Brandt and Quixote oppose the reassignment of Channel 260 from Pueblo to Colorado Springs. Quixote, the applicant for Channel 260 at Pueblo with a Cheyenne Mountain transmitter site (BPH–7885), alleges Channel 260 is the only one of the three unoccupied FM channels at Pueblo which can provide the entire Pueblo trade area with service. Quixote argues that the reassignment of Channel 260 to Colorado Springs would be "indefensible"; the primary contention is that this would be contrary to the Commission's population criteria both from the viewpoint of adding a "seventh" channel to Colorado Springs (here, Quixote includes Station KCMS, Channel 274, Manitou Springs, described as a Colorado Springs suburb),[8] and an illogical reduction of Pueblo's quota under that standard. Quixote urges that KYSN's proposal to replace Channel 260 with Channel 296A is anomalous in the light of the Commission's policy to avoid intermixing classes of FM assignments especially since the lead proposal under consideration here (RM–1886) is bottomed on the contention that Station KPIK–FM, Channel 232A, is unable to compete with the Class C stations at Colorado Springs. Quixote also adduces data and information to show that Pueblo and Pueblo County are in a period of rapid economic and industrial growth.

8. In the latter respect, we are told that Pueblo is the financial and industrial hub of southern Colorado. It is located in the Front Range

[6] KYSN surmises that Stations KVOD and KLIR–FM eventually will change their respective transmitter sites to Lookout Mountain (west of Denver)—the location of most Denver television and FM stations—substantially increasing coverage as compared to present city level sites. As relevant here, such a move would increase the spacing(s) to Cheyenne Mountain by five miles.

[7] As noted in fn. 4, these have dual city identification as do the two Pueblo television stations. Colorado Springs and Pueblo are a single television market.

[8] Brandt also points to the Manitou Springs station as the seventh one in the Colorado Springs urbanized area; Manitou Springs is roughly five miles from Colorado Springs. Channel 288A (Station KWYD) at Security in fact is the seventh channel in the Colorado Springs SMSA; see Para. 3 above.

Complex of Colorado, which Quixote says is one of the most prolific growth areas in the United States not only as to population but industrially and economically. There are two planned cities for Pueblo County—Pueblo West and Colorado City; other such communities have been recommended for Pueblo County. Expansion of industry and other facilities is in progress: CF&I Steel Corporation is engaged in a $50 million plant improvement and expansion program; the Department of Transportation High Speed Ground Transportation and Urban Mass Authority facilities are being expanded; Southern Colorado State College plans to establish graduate programs, expand its student body by one-third (to 10,000) by 1975, and complete the Belmont Campus; and Pueblo Army Depot is located nearby. Other indicia of growth include completion of Aspen Skiwear's new plant at Pueblo West; expansion of Walters Brewery; building of the Comanche Power Plant by the Public Service Company of Colorado; completion of the first phase of construction of the Pueblo Dam; planned construction by Johns Manville Corporation of a plastic pipe manufacturing plant at Pueblo; and Mountain Bell Telephone plans for an electronic call switching system at Pueblo West. The Pueblo Development Commission was established in 1970 to expand local business and industry and attract other business and industry. Brandt refers to these and other developments; e.g., the commencement of operation of the U.S. Government Printing Office Western Automated Distribution Center.

9. As noted earlier, KYSN requested leave to file "supplemental" comments directed at Quixote's amendment to its application proposing a transmitter site on Cheyenne Mountain, which it first learned about from Quixote's reply comments. According to KYSN, this would place Quixote adjacent to Colorado Springs and over 30 miles from Pueblo and thus provide better service to the former than the latter. While Quixote premises the Cheyenne Mountain site as necessary to cover more of the Pueblo trade area, KYSN infers that it is intended as a *de facto* reallocation or at any rate an attempt to gain advertising support from Colorado Springs. In any event, KYSN draws the conclusion that Channel 260 would more effectively be a Colorado Springs rather than a Pueblo assignment. Accordingly, KYSN says such a result would be better accomplished by reassigning the channel to Colorado Springs thus allowing all interested parties to apply.

10. The common factor here is that both proposals involve a channel assignment to Colorado Springs, and, to that extent, certain background information and data are equally relevant. Additionally, each petitioner supports the other's proposal, although each says that if only one proposal should be adopted it should be its own. Yet, each proposal presents separate issues. The Western proposal (RM–1886) raises questions whether a Class A assignment should be changed to a Class C assignment where the city's other FM assignments are Class C channels; all are occupied. The proposal of KYSN raises questions as to whether Channel 260 should be assigned to Colorado Springs which reassignment requires the deletion of the Channel 260 assignment from Pueblo, Colorado (RM–2018). KYSN proposes the assignment of Channel 296A as a substitute at Pueblo.

11. *RM–1886.* The proposal to substitute Channel 230 for 232A at Colorado Springs apparently was intended to make all stations in that community competitive at least from the viewpoint of class. As stated in the Notice, Western had implied that Station KPIK–FM could not compete with the four Class C FM stations at Colorado Springs and Station KCMS–FM, Channel 274, Manitou Springs. (As previously mentioned, Manitou Springs is a city about five miles west of Colorado Springs.) The Notice was adopted on the basis that this was sufficient reason to consider the possible assignment of Channel 230 to Colorado Springs. The Notice requested that Western provide preclusion studies showing the areas where Channel 230 would preclude other assignments. While Western did not make an adequate showing in this respect, a study by the Commission shows that the areas of preclusion (which occur only on Channels 229, 230, and 231) are very limited. Only five communities with a population of 1,000 or more are precluded: Taos, New Mexico (population 2,475), has a Class IV AM station and a Class A FM assignment; Burlington, Colorado (population 2,828), has a daytime-only AM station; Limon (population 1,814), Fowler (1,241), and Ordway (population 1,017), all in Colorado, have no radio stations and are in eastern Colorado where potential FM assignments are scarce. In sum, the preclusion that would be caused by the assignment of Channel 230 to Colorado Springs is minimal.

12. It is our policy to avoid intermixture of channels, and this is possible here by a simple change of channels without serious preclusionary effect. The result is one that serves the public interest, convenience, and necessity. Accordingly, we are amending the FM Table of Assignments to assign Channel 230 in lieu of Channel 232A at Colorado Springs, Colorado.

13. *RM–2018.* This is the proposal of KYSN to reassign Channel 260 from Pueblo to Colorado Springs and, if deemed appropriate, the substitution of Channel 296A at Pueblo. Preclusion is minimal. Only four communities are affected. One of these has an FM assignment, and assignments may be made to the other three (one of which has a Class IV AM station). As already noted, KYSN and Western favor the proposal principally on the ground that because of the size and importance of Colorado Springs another FM channel assignment should be made to that city. They urge that this comports with the population criteria for FM assignments. In this respect, both point to the tremendous population growth of Colorado Springs, its urban area, and SMSA in the decade between 1960 and 1970 (see para. 3). KYSN also relies on an argument that the site proposed by Quixote in its application for Channel 260 at Cheyenne Mountain demonstrates that Channel 260 is better suited to serve Colorado Springs rather than Pueblo. Quixote and Brandt oppose the proposed reassignment of Channel 260 on the grounds that under the population criteria, Pueblo, whose SMSA is on the "eve" of great population and economic growth, is entitled to its present quota of FM channel assignments and that the proposed substitution of Channel 296A for 260, which would intermix classes of channels at Pueblo, is inappropriate because of service limitations and because this would result in

an inconsistency with the principal proposal (RM–1886) which in large part is directed at eliminating an intermixture situation at Colorado Springs.

14. To the extent that strong reliance is placed on population criteria to support the Channel 260 proposal for Colorado Springs, it seems appropriate to discuss its genesis and relationship to the Commission's Rules and Regulations and the Act. The Further Notice in Docket No. 14185 set out "criteria as to community population" to be used for making assignments to a "city" of a certain size. This followed a discussion of "priorities in making assignments in the [FM] Table." Significantly, it was recognized "that there can be no fixed, mechanical application of priorities".[9] The term "community" has its origin in Section 307(b) of the Communications Act of 1934, as amended, which directs the Commission to make a fair, efficient, and equitable distribution of broadcast facilities to States and communities. Section 73.210 of the Commission's Rules and Regulations in discussing the place of license and location of the main studio of an FM station in addition to "community" uses more precise terms such as "city", "town", "village", or other "political subdivision" to denote that embraced are both incorporated and unincorporated communities. The terms "urbanized area" and "standard metropolitan statistical area", on the other hand, respectively are Census and Office of Management and Budget (OBM) definitions: the former is intended to delineate urban and rural population,[10] and the latter is a specifically designated area consisting of a "county (or counties) containing * * * a city (or cities) [generally of at least 50,000 inhabitants, although a city of 25,000 may qualify if certain criteria are met] * * * [and] contiguous counties [which] * * * according to certain criteria * * * are socially and economically integrated with the central city."[11] Thus, there is a misconception underlying the contention of KYSN and Western that SMSA population is more appropriately to be considered under population criteria. (If *arguendo*, this were the test, then we would have to include both the channels at Manitou Springs (Channel 274, Station KCMS–FM) and Security (Channel 288A, Station KWYD) with the result that one could say that the Colorado Springs

[9] Compare this statement with the then recent holding in *Television Corporation of Michigan, Inc.* v. *FCC*, 294 F. 2d 730 (D.C. Cir. 1961), that the priorities set out in the Sixth Report and Order as to the Television Table of Assignments are not rigid and inflexible standards.

[10] "An urbanized area [for which there are criteria] consists of a central city or cities, and surrounding closely settled territory."

[11] SMSA's are defined by the OMB by applying formal, objective, published criteria to the data of the most recent census. While the criteria have been altered (and the number of SMSAs have increased and some reconstituted), an SMSA is defined in terms of population and gographical groupings rather than political entities to facilitate the analysis of economic and other statistical data common to an area; see *Report and Recommendations of Director's Task Force on Standard Metropolitan Statistical Areas (SMSA's)*, dated March 1, 1973 (published in the *Statistical Reporter*, April 1973, No. 73–10). SMSA's should not be used in any other way unless a Government department or agency has specifically determined that such areas might be otherwise used to that organization's objectives; see Exhibit N to OMB Circular No. A–46 Revised (May 1973). No such determination has been made by the Commission although revision of the "historic concept" of licensing to a community has been discussed; see *Broadcast Station Identification Requirements*, 10 F.C.C. 2d 399, 401, and dissent at 406 (1967). SMSA had its origin as "Standard Metropolitan Area" in 1949 to replace "metropolitan districts", "metropolitan counties", "industrial areas" and "labor market area", because the different definitions created problems of correlation. See *Standard Metropolitan Statistical Areas*, Bureau of the Budget, p. vii (1967).

104–024—74——3

SMSA has its quota of FM assignments under the population criteria.) Under the population criteria, Colorado Springs, a city with a current population of 152,735 (Chamber of Commerce as of January 1, 1973; see para. 6) and five channels, appears to have more than its fair apportionment in terms of the four to six scale for a city of 100,000 to 250,000 population.

15. More importantly, however, the population criteria are only one of many considerations to be weighed in making "a fair, efficient, and equitable" distribution of FM assignments under Section 307(b) of the Communications Act of 1934, as amended. As we recently said, they "are a guide and not an immutable standard" (*Fresno*, 38 F.C.C. 2d 525, 526 (1972)); [12] in that instance, we deviated from the criteria because of demand for and the general availability of FM channels for assignment in the area.[13] An overriding consideration is the availability of FM channels. Here, in order to assign Channel 260 to Colorado Springs, it would be necessary to delete that channel assignment from Pueblo, Colorado, and substitute Channel 296A. As already noted, Channel 260 is one of four FM channels assigned to Pueblo since the establishment of the new FM Table of Assignments when the official Census population for Pueblo was 91,181 and far in excess of that of Colorado Springs. This accounts for the original assignments to these communities of four and three channels, respectively.[14] While the population increase of Pueblo has been more modest than that of Colorado Springs and the State of Colorado,[15] Pueblo and its SMSA appear to be entering a period of great economic and concomitant population growth. Assignments in the Table originally were based on probable demand for service based on an assumption that population was an appropriate indicator of future needs; on the other hand, as in the case of Colorado Springs, additions have been made based on actual demand and changed circumstances. However, the fact that there may be an acute demand in one place does not mean that we should disturb the long range pattern because actual demand at another has not been fully manifested, especially when there is a paucity of available FM assignments to meet the needs of both places fully complying with all policy criteria.

16. KYSN's contention that Quixote's choice of a Cheyenne Mountain transmitter site from which one could better serve Colorado Springs than Pueblo is unpersuasive. Even assuming *arguendo* that Quixote is granted a construction permit for Channel 260 and commences operation from Cheyenne Mountain, we do not assume an intention to serve Colorado Springs because it is nearer. While a station has an obligation to serve its entire coverage area, the primary responsibility is to serve the community to which specifically licensed [16] and Quixote's application has not indicated any intention to serve Colorado Springs (see Section 73.210 and *Primer on Ascertainment*

[12] See and compare the quotation from the Further Notice in Docket No. 14185 quoted in para. 14 about priorities.
[13] See also *Hattiesburg* and *Parkersburg*, 37 F.C.C. 2d 54, 55–6, 58 (1972).
[14] See para. 3 about the addition of the fourth and fifth channels to Colorado Springs and the more recent assignment at Security.
[15] The increase for the State of Colorado was 25.8% in the decade between 1960 and 1970 Census.
[16] See also fn. 11.

of Community Problems, 27 F.C.C. 2d 650, 658 (1971)). If there is such an intention, then an appropriate dual city identification or assignment should be sought (see and compare *Oak Ridge*, 32 F.C.C. 2d 937, 942 (1972)).

17. In view of the foregoing, we conclude that the public interest, convenience, and necessity would not be served by the reassignment of Channel 260 from Pueblo to Colorado Springs.

18. Authority for the action taken herein is contained in Sections 4(i), 303 (g) and (r), and 307(b) of the Communications Act of 1934, as amended.

19. In accordance with the foregoing, IT IS ORDERED, That the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) IS AMENDED, effective April 1, 1974, as concerns Colorado Springs, Colorado, to read as follows:

City:	*Channel No.*
Colorado Springs, Colo	225, 230, 236, 240, 270

20. IT IS FURTHER ORDERED, That Western Broadcasting Company shall amend its application for renewal of the license of Station KPIK–FM, Colorado Springs, Colorado, to specify operation on Channel 230, subject to the following conditions:

(a) The licensee may continue to operate on Channel 232A until it is ready to operate on Chanel 230 or the Commission sooner directs.

(b) At least 30 days before it wishes to commence operation on Channel 230, or within 30 days after it receives notification from the Commission if the Commission sooner directs the change as set forth in (a) above, the licensee of Station KPIK–FM shall submit to the Commission the technical information normally required of an applicant for a construction permit on Channel 230 at Colorado Springs, Colorado.

(c) Ten days prior to commencing operation on Channel 230, the licensee shall submit the same measurement data normally required in an application for an FM broadcast station license.

(d) Western Broadcasting Company shall not commence operation on Channel 230 until the Commission specifically authorizes it to do so.

21. IT IS FURTHER ORDERED, That the request of KYSN Broadcasting Company to file supplemental comments IS GRANTED.

22. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 74–71

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (ENTERPRISE AND GREENVILLE, ALA.; BONIFAY, CHIPLEY, AND PENSACOLA, FLA.)	Docket No. 19561 RM–1844 RM–1855 RM–1982

REPORT AND ORDER

(Proceeding Terminated)

(Adopted: January 23, 1974; Released: January 29, 1974)

BY THE COMMISSION:

1. The Commission here considers the Notice of Proposed Rule Making, adopted July 26, 1972 (FCC 72–680; 37 Fed. Reg. 15940), in this docket concerning possible amendment of the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) with respect to Enterprise and Greenville, Alabama, and Bonifay, Chipley, and Pensacola, Florida, and the Request for Supplemental Information, adopted June 21, 1973 (FCC 73–671; 38 Fed. Reg. 17252). The Notice was the outgrowth of a petition by Wallace Miller, D.V.M. (Miller), requesting Class C Channel 294 [1] as a second FM assignment to Enterprise (RM–1844), and the petitions of Barba Investment Company (Barba) and Roy L. Hess (Hess) requesting further channel assignments at Pensacola (RM's–1855 and 1982). These petitions are considered together because the Notice suggested as possible alternatives to the Enterprise proposal the assignment of Channel 296A to Greenville and to either Chipley or Bonifay (all three of which are communities without FM broadcast service and which would be precluded by the Enterprise proposal) and these alternatives conflicted with Barba's Pensacola proposal. Since each of the alternative communities has less than 10,000 population, for which size community an FM assignment normally is not made unless there is a showing of demand (that is, someone willing to promptly apply for the channel if assigned and to build if the application is granted), the Notice was intended to ascertain whether there is any such interest as to Greenville and Bonifay or Chipley (the latter were mutually exclusive). Sunny Hills of Chipley, Inc. (Sunny Hills), licensee of Class IV AM Station WBGC there, responded as concerns Chipley (population 3,347) and W. J. Williamson did so for Greenville (population 8,033). In the circumstances, Bonifay drops from consideration.

[1] The transmitting antenna must be located at least five miles west of Enterprise.

2. Greenville, Enterprise, and Chipley, respectively, lie roughly to the north, northeast, and east of Pensacola, and each is approximately 103 miles from Pensacola. Enterprise is about 56 miles from Greenville and 40 miles from Chipley, while Greenville and Chipley are roughly 95 miles apart. Our proposals with regard to Enterprise, Greenville, and Chipley were as follows:

City	Channel No.	
	Present	Proposed
Enterprise	245	245, 294
or		
Chipley		296A
Greenville		296A

The proposal for Enterprise on the one hand, and for the communities of Chipley and Greenville on the other, were mutually exclusive. In making these proposals, we noted that while under our population criteria [2] Enterprise was possibly entitled to a second channel, consideration should be given to the possibility of assigning channels to Greenville and Chipley in the light of the abundance of service in the area that an Enterprise station would serve. With regard to Pensacola, our proposal was:

City	Channel No.	
	Present	Proposed
Pensacola	231, 264, 268	231, 264, 268, 243 or 297 or 298

Barba proposed Channel 297. This proposal conflicted with the possible assignment of Channel 296A to Greenville and to Chipley (or Bonifay). Hess proposed Channel 243. In addition, he also proposed changing the Barba proposal from 297 to 298 because this would reduce preclusionary effect. As we mentioned in the Notice, this proposed assignment of 298 to Pensacola eliminated the conflict with the Greenville/Chipley (Bonifay) proposal. We also stated that because of the size of the population of Pensacola we would only consider assigning one additional channel there, absent some compelling reason, although we invited comments with regard to each of the channels—243, 297, and 298.

3. Those commenting with respect to the Enterprise proposal (RM–1844) are: Miller; Sunny Hills; Wiregrass Broadcasting Company, licensee of Stations WIRB–AM (daytime only) and WIRB–FM at Enterprise (Wiregrass); Williamson; and Jamie Ethridge, the mayor of the city of Greenville. Those commenting with respect to the Pensacola proposals (RM's 1855 and 1982) are: Barba; Hess (the main stockholder in Wonder Corporation, licensee of daytime AM Station WVIX, Pensacola); Sound Broadcasting Corporation, li-

[2] Further Notice of Proposed Rule Making, Docket No. 14185, adopted July 25, 1962 (FCC 62–867), and incorporated by reference in para. 25 of the Third Report, Memorandum Opinion and Order, adopted July 25, 1963, 23 R.R. 1859, 1871.

censee of Station WLPR(FM), Channel 241, Mobile, Alabama (Sound); WCOA Radio, Inc., licensee of Stations WCOA–AM and FM, Pensacola (WCOA); and Fredric T. C. Brewer, licensee of Station WMEZ–FM, Channel 231, Pensacola (Brewer). Wiregrass opposes the assignment of another FM channel to Enterprise. Sound primarily opposes the assignment of Channel 243 to Pensacola, while WCOA and Brewer object to any new assignment to that community.

4. The Notice provoked substantial comment, including various counterproposals to resolve the various conflicts. The counterproposals made by Miller, Hess, and Barba were designed to permit the assignment of channels to Enterprise, Greenville, and Chipley. However, there was a lack of careful consideration given to the siting of stations and a failure to consider certain existing stations, which raised questions as to the feasibility of the substitute assignments. For example, both Hess and Barba urged the assignment of Channel 280A to Enterprise (and Channel 232A to either Bonifay or Chipley and 249A or 296A to the other) but later recognized that Channel 280A could not be assigned to Enterprise because it was assigned to Ozark, Alabama.

5. Our June 1973 Request for Supplemental Information was intended to elicit further material to aid us in giving consideration to making as many of the proposed assignments as possible. At the time of its issuance, two alternatives had emerged. One was that of assigning channels to three communities—Greenville (240A), Chipley (296A), Pensacola (298). The other was that of assigning channels to four communities—Greenville (240A), Chipley (249A), Pensacola (297), and Enterprise (294). However, accommodating all four communities required that the Chipley transmitter be located at least 7.5 miles south of that community, and it was to obtain information as to the availability and feasibility of such a site that the Request for Supplemental Information was issued.

6. We first discuss the Enterprise, Greenville, and Chipley portion of this proceeding. As indicated above, although we proposed the assignment of Channel 294 to Enterprise (population 15,591), we also proposed the alternative of assigning Channel 296A to Greenville (population 8,033) and to Chipley (population 3,347) because of the service available to the area that the proposed Enterprise station would serve and because assignment of the proposed channel to Enterprise would have precluded assignment of a channel to the other two communities neither of which has an FM channel assignment.

7. Wiregrass, the licensee of the only local aural stations in Enterprise [WIRB (daytime only) and WIRB–FM (Channel 245)], opposes the assignment of another FM channel to Enterprise and supports the assignment of Channel 296A to Greenville and Chipley as being more consistent with Enterprise's economic situation and overall criteria for FM assignments. As to the former, Wiregrass says assignment to Enterprise is unnecessary in view of that community's economic decline which to a large extent relies on nearby Fort Rucker, the Army Aviation Center (for training pilots for helicopter and fixed-wing Army aircraft), the activities of which have decreased with the deescalation of the Vietnam War. In essence, Wiregrass contends that Enterprise has been in a wartime boom and that its

economy will revert to that of a small Alabama community dependent upon agricultural revenues. Wiregrass also points out that its stations are not the only broadcast media serving Enterprise and Coffee County (in which Enterprise is located) and that Wiregrass must vie with aural broadcast stations at Dothan, Ozark, and Geneva, and Dothan's television stations.

8. Underlying the objection of Wiregrass is a concern for economic well-being which is relevant if the public interest as opposed to a private interest is affected. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *Carroll Broadcasting Co.* v. *FCC*, 258 F. 2d 440 (D.C. Cir. 1958). As held in the *Carroll* case, the burden of a party making such a claim is a heavy one, and we have no real basis for rejecting a proposal for another FM channel assignment at Enterprise in this respect. The Wiregrass objections are of a general nature and only hint that the overall public interest might be seriously affected by a competing FM station at Enterprise. We do not view the Wiregrass contentions in this respect as persuasive. Its true concern, it would appear, is its private interest, and, in such circumstances, we may disregard the economic injury argument. See *Hattiesburg*, 37 F.C.C. 2d 54, 58 (1972); and *Oak Ridge*, 32 F.C.C. 2d 937, 940 (1972).

9. Although we do not find the Wiregrass arguments to be such as to warrant denial of a second FM channel assignment to Enterprise, and although Enterprise is eligible for a second assignment under our population criteria, we do not lose sight of the substantial importance of the possible assignment of first FM channels to Greenville and to Chipley. As to Greenville, it appears that a transmitter for Channel 240A could be located in town, while one on Channel 296A would have to be four miles to the southwest. For this reason we believe the former assignment to be the preferable one. With regard to Chipley, Sunny Hills (licensee of the only local aural station in Chipley, Class IV AM Station WBGC), in response to the Request for Supplemental Information, opposed the assignment of Channel 249A because it would require a transmitter site about 7.5 miles south of that community. Sunny Hills stated that a transmitter site so far from Chipley would be burdensome because of limited effective range, the construction of Highway 10 (about four miles south of Chipley) which possibly adds problems as to site availability, and the economic burden of operating apart from AM Station WBGC. Miller contends that Sunny Hills' arguments are ones of personal convenience, while Wiregrass supports Sunny Hills' objections on the basis that public interest would be better served by assigning Channel 296A to Chipley rather than Channel 249A because there would be service to 24,172 persons within the 1 mV/m contour—6,750 more (39% greater) than a station with a transmitter 7.5 miles south of Chipley.

10. For reasons mentioned below, we believe that if a channel is assigned to Pensacola it should be Channel 297 rather than 243 or 298. Assignment of Channel 296A to Chipley conflicts with assignment of 297 to Pensacola since the reference points of the two communities are short spaced by about two miles. Assignment of 296A to Chipley also conflicts with assignment of 294 to Enterprise. Thus, the question is whether to make provision for a first FM service at Chipley while deny-

ing Enterprise and Pensacola their second and fourth commercial FM channels. Considerations as to Greenville will not affect our decision in this matter since Channel 240A may be assigned to that community regardless of what channels under consideration herein are assigned to the other three communities.

11. We now discuss the questions as to a channel assignment at Pensacola. As stated in the Notice (para. 6), Pensacola (population 59,507), the largest city in western Florida, is the seat of Escambia County (population 205,334), and the principal city of the Pensacola SMSA which consists of Escambia and Santa Rosa Counties with a total population of 243,075. FM Channels 231, 264, and 268 are presently assigned to Pensacola and are operational as Stations WMEZ, WCOA–FM, and WBOP–FM. Six AM stations provide other aural service—daytime Stations WBOP, WVIX, and WPFA; Class IV Stations WBSR and WNVY; Class III Station WCOA; and noncommercial FM Station WCPS. Of these, WVIX, WMEZ, and the WCOA stations are parties to the proceeding.

12. Despite our having stated in the Notice that under the population criteria (see fn. 2 above) it is the Pensacola population and not the Pensacola SMSA population that is to be considered, and that in the absence of compelling factors only one FM channel assignment would be made to Pensacola.[3] Hess and Barba vigorously urge that both Channels 243 and 298 [4] should be assigned to Pensacola, in large measure relying on SMSA population. WCOA and Brewer, on the other hand, maintain that the population criteria should be strictly adhered to especially since the assignment of Channel 243 or 298 would deprive other communities of an FM assignment (see fns. 5 and 7 below). Hess and Barba argue that population criteria are merely guidelines, that SMSA population should be given consideration, that Pensacola is the site of Pensacola Junior College and the University of West Florida, and that there are economic, historical, and growth considerations which serve as a basis for assigning two additional channels to Pensacola.

13. We have today dealt with the SMSA population argument at some length specifically, and our population criteria generally, in deciding *Colorado Springs* (see Report and Order in Docket No. 19644 adopted January 23, 1974 (FCC 74–70)), — F.C.C. 2d —.

Briefly, we pointed out that population criteria are based on the requirements of Section 307(b) of the Communications Act of 1934, as amended, to make fair and equitable distribution of radio services to communities and that "SMSA" is not a community but rather a statistical concept to facilitate analysis of economic and other data common to an area. (We also pointed out that population concentration in and around a community is deemed important in making assignments but that a more compelling factor is channel availability.[5] In this respect,

[3] The guidelines provide for two to four channels for a city of 50,000 to 100,000 population.

[4] Barba, in recognition of the fact that its proposal to assign Channel 297 conflicts with the Commission's counterproposal to assign Channel 296A to Greenville and to Chipley, supports Hess' proposal to assign both Channels 243 and 298 to Pensacola.

[5] Among other things, counterproposals have been made on the basis that the various proposals for Pensacola would bar channel assignments for Valparaiso, population 6,504, and Destin, population 1,536 (unincorporated), both in Okaloosa County, population

the proposal to assign Channel 297 to Pensacola conflicted with the proposed assignment of Channel 296A to Greenville and Chipley, and, indeed, this was the basis of being considered together in this proceeding.) As to the argument that Pensacola is the location of two important educational institutions, even assuming that Pensacola Junior College and the University of West Florida are located in Pensacola (the latter actually is located outside the city, in Escambia County), there is no reason to give student population special consideration inasmuch as it was already considered in determining the population of Pensacola (and the area); the 1970 Census states that a college student's "Usual place of residence" is "the area in which * * * living while attending college".

14. As contended, the population criteria are merely guidelines and not immutable standards. Indeed, within the bounds of availability and *usability* we have deviated one way or the other. Thus, we have refrained from making a "quota" assignment where to do so would deprive another community of an FM channel assignment. See "Policy to Govern Requests for Additional FM Assignments", 8 F.C.C. 2d 79 (1967). On the other hand, the quota has been exceeded where the circumstances warranted such action; see, e.g., *Fresno*, 38 F.C.C. 2d 525, 526 (1973). And we take such action here by assigning Channel 297 primarily because there is no other place that it might be used (except for a small area around Pensacola) because of the mileage separations to Stations WSJC–FM (Channel 298), Magee, Mississippi; WROA–FM (Channel 296A), Gulfport, Mississippi; and WHYD–FM (Channel 297), Columbus, Georgia; see and compare *Hattiesburg*, 37 F.C.C. 2d 54, 55 (1972). In these circumstances, we need only briefly discuss other arguments and we do so only as to those of a general nature.

15. WCOA in part opposes the assignment of another channel to Pensacola because of economic impact. Reliance is placed on Table 20 of the Commission's report as to *AM–FM Broadcast Data—1970* which shows that the Pensacola FM stations reported a loss of over $53,000, and that, in this respect, the Commission has long recognized that in order to provide effective service a station must be economically viable. In reply, Hess says that WCOA's opposition is predicated on operation of stations in past years when there was a stagnant economy without considering the substantial improvement of economic conditions and Pensacola's potential. The short answer is that the same considerations apply here as to the Wiregrass argument in opposition to the assignment of a second channel to Enterprise (see paragraph 8 above). As there, we have no adequate basis for a finding that another channel assignment to Pensacola would have an adverse economic impact. Although Table 20 for 1970 (the year on which WCOA relies) shows total broadcast revenues of approximately $41,000 for three FM stations in Pensacola, it shows $176,000 for two stations in 1971, and $255,871 for two stations in 1972.

88,187. Okaloosa County adjoins the Pensacola SMSA. Radio service there consists of: daytime AM Stations WCNU and WJSB and FM Station WAAZ (Channel 285A), which is affiliated with WJSB, at Crestview (population 7,952); AM Stations WFTW–AM (daytime only) and WNUE and WFTW–FM (Channel 257A) at Fort Walton Beach (population 19,994); and Station WFSH licensed to Valparaiso-Niceville. The population of Niceville is 4,024.

16. Sound, licensee of Station WLPR (FM), Channel 241, Mobile, Alabama, opposes the assignment of Channel 243 to Pensacola. It contends that a transmitter on Channel 243 at Pensacola would have to be located 12 to 13 miles east of the reference point in order to meet mileage spacing to Sound's present FM site [6] and that this would be in an area close to Eglin Air Force Base where an antenna of sufficient height to provide community grade service to Pensacola would cause airspace hazards. Additionally, Sound expresses great concern because the assignment of Channel 243 to Pensacola would limit WLPR from moving its transmitter from its present site in downtown Mobile to the east of that city in the vicinity of the three Mobile-Pensacola television towers. For example, a move to the tower of WKRG–FM–TV—the most westerly of the three towers—would require the Channel 243 transmitter at Pensacola to be about 30 miles east of the reference point, an area where, Sound says, the Federal Aviation Administration is most unlikely to approve an antenna structure of requisite height, because of existing airspace requirements. Sound also indicates that Channel 298 at Pensacola with a transmitter east of Gulf Breeze would face similar airspace hazard problems. (Sound has no objection to the assignment of Channel 297 to Pensacola.)

17. Both Hess and Barba take issue with Sound's contentions about Channels 243 and 298 specifically and generally, and, Sound contests Barba's and Hess' specific arguments. Barba and Hess object to Sound's contentions about WLPR's future expansion on the ground that our rules do not provide for future intentions or ambitions. This objection by Hess and Barba is fundamentally correct, and, in the circumstances, we need not reach issues of whether WLPR would be allowed to operate from the WKRG–TV–FM antenna, whether there would be second harmonic interference if WLPR operated from the WALA–TV (Channel 10) antenna, whether a move to the WEAR–TV antenna would fragment the Mobile market because of inadequate coverage while serving the Pensacola urban area incompletely, whether there would be and the extent of air hazard problems if Channel 243 had to operate at various points farther east of Pensacola, and whether Sound's various arguments are supported by substantial fact (a question raised by Barba). For present purposes, it should be noted that any proposal of Sound to change facilities which would result in a change of coverage area without providing at least the same service to those already served would pose a serious question; see and compare *Hall* v. *FCC*, 237 F. 2d 567 (D.C. Cir. 1956) with *Television Corporation of Michigan* v. *FCC*, 294 F. 2d 730 (D.C. Cir. 1961). However, that issue is not before us. As more pertinent here, we are satisfied that on the basis of the information adduced the available sites for either Channel 243 and 298 at Pensacola appear to be in areas where there would be substantial airspace hazard questions. On the other hand, there are no such problems as concerns the assignment of Channel 297 to Pensacola.

[6] The Notice erroneously stated four miles east of the reference point.

CONCLUSIONS

18. The Notice proposed assigning a channel to Enterprise (294) or, in the alternative, a channel to Greenville (296A) and to Chipley (296A)—the latter proposal being mutually exclusive with the former. It also contained a proposal to assign one channel, out of three possible channels (243, 297, 298) to Pensacola—one (297) of the three being mutually exclusive with the Greenville/Chipley proposal. The record in this proceeding has shown that, in fact, channel assignments may be made to all four of these communities.

19. With regard to Greenville, because it has a population of under 10,000 persons, it was necessary to ascertain whether a demand for a channel there was present. Mr. Williamson stepped forward and indicated his interest in constructing a station there. We are therefore assigning this community of over 8,000 persons its first FM channel, 240A, in view of its size and the demonstrated demand. As previously stated, this channel appears to be preferred to Channel 296A since use of the latter channel would require a transmitter site four miles outside the community. Moreover, selecting this channel for Greenville permits the assignment of Channel 294 to Enterprise, whereas using Channel 296A at Greenville precludes such an assignment. Assigning Channel 240A to Greenville also permits the assignment of Channel 297 to Pensacola, which assignment of 296A to Greenville would have precluded.

20. As to Chipley, also a community of under 10,000, although an interest in a first FM channel for that community was evidenced by Sunny Hills after our Notice proposed assignment of Channel 296A there, the interest waned when our Request for Supplemental Information indicated that the transmitter site for another channel that we might assign there would have to be located at least 7.5 miles south of Chipley. Sunny Hills apparently is only interested if an FM assignment at Chipley is made available which would allow it to locate its FM transmitter at its AM transmitter site. It therefore argues against assigning Channel 249A to Chipley and favors Channel 296A. The existing AM–FM licensee at Enterprise (Wiregrass) also favors the latter assignment at Chipley and points out that an FM station operating on this channel would serve many more persons than would a station operating on Channel 249A. Assigning Channel 296A to Chipley would prevent the assignment of a second channel (294) to Enterprise. Moreover, it would preclude the assignment of Channel 297 to Pensacola. We have already observed that 297 is the only channel that may reasonably be assigned there in view of the airspace hazards attending the use of Channels 243 or 298. As we have also observed, if Channel 297 is not assigned to Pensacola it cannot be used elsewhere.

21. Two choices appear to be open. (a) We may assign Channel 296A to Chipley (population about 3,300) as its first FM assignment, admittedly a high priority in our assignment plan. This would deny Enterprise (population over 15,000) a second FM channel, and Pensacola (population just short of 60,000) a fourth FM channel—a channel

which cannot be used elsewhere. (b) We may assign Channel 249A to Chipley which would permit the assignment of a second channel at Enterprise and a fourth at Pensacola. This assignment would serve fewer persons at Chipley than could a Channel 296A assignment there, but it would still bring a first local FM service to that community while accommodating the needs of Enterprise and Pensacola and effecting a most efficient use of a Channel 297 Pensacola assignment. However, such an assignment at Chipley would require a transmitter site outside of town. Sunny Hills has expressed no interest in using the channel because of this, and we do not normally assign channels to communities of this size absent a demand evidenced by an interest in using a channel if it is assigned.

22. On balance, we find that the public interest would be better served by assigning Channel 294 to Enterprise and Channel 297 to Pensacola,[7] and by not at this time considering an assignment of Channel 249A to Chipley in view of the lack of interest in use of that channel there. We also find it in the public interest to assign Channel 240A to Greenville.

23. Authority for the adoption of the amendments proposed herein is contained in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

24. In accordance with the foregoing, IT IS ORDERED That effective March 7, 1974, the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) IS AMENDED with respect to the cities listed below as follows:

City:	*Channel No.*
Enterprise, Ala	245, 294
Greenville, Ala	240A
Pensacola, Fla	231, 264, 268, and 297

25. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[7] This Pensacola assignment does not foreclose from consideration the possibility of an FM channel assignment at Valparaiso or Destin. Because of their size, and in accordance with general procedure, we would not make such an assignment in the absence of a showing as to an interest for use of an FM channel at either community. There is little point in holding this proceeding open to have information and data adduced in this respect. This would needlessly delay decisions as to outstanding rule makings; moreover, anyone interested in such assignment(s) may petition for rule making and make the requisite showing as to demand for such service and willingness to become a broadcaster.

F.C.C. 74R-33

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
HENDERSON BROADCASTING CO., INC., BLOOMINGTON, IND.	Docket No. 19813 File No. BPH-7946
INDIANA COMMUNICATIONS, INC., BLOOMINGTON, IND.	Docket No. 19814 File No. BPH-8030
BLOOMINGTON MEDIA CORP., BLOOMINGTON, IND.	Docket No. 19815 File No. BPH-8032
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 4, 1974)

BY THE REVIEW BOARD:

1. Mutually exclusive applications for a construction permit for a new FM station in Bloomington, Indiana have been filed by Henderson Broadcasting Co., Inc. (Henderson), Indiana Communications, Inc. (Indiana), and Bloomington Media Corporation (Bloomington). Now before the Review Board is a petition to enlarge issues, filed October 5, 1973, by Indiana requesting the addition of the following issues against Bloomington:[1]

(a) To determine who will have actual control of Bloomington Media Corporation.

(b) To determine the location of Bloomington Media Corporation's proposed main studio, and if outside the city limits of Bloomington, whether in violation of Rule 73.210.

(c) To determine whether Bloomington Media Corporation has attempted to mislead or misrepresent facts to the Commission regarding control of its stock, and/or the location of its proposed main studio, and if so, the effect which such attempts have upon Bloomington Media's basic or comparative qualifications.

2. In support of its proposed issue (a) and the related part of issue (c), Indiana contends that there are unresolved questions concerning the control of Bloomington which the applicant has attempted to conceal from the Commission. Specifically, petitioner maintains that although Bloomington's application represents that Jerold E. Hilgenberg owns all of the 25 issued and outstanding shares of Class B stock and one share of Class A stock and Frank A. Rogers owns 25 of the 26 issued and outstanding shares of Class A stock and has subscribed

[1] Also before the Board are: opposition, filed November 15, 1973, by the Broadcast Bureau; an opposition, filed November 15, 1973, by Bloomington; and a reply, filed December 12, 1973, by Indiana.

for an additional 425 shares of Class A stock, Bloomington nevertheless concludes that Hilgenberg will own 51% of the corporation's stock and Rogers 49%. According to Indiana, Jerold E. Hilgenberg will not control the corporation as Bloomington claims. Rather Indiana alleges that when Frank A. Rogers purchases the 425 additional shares of Class A stock to which he is subscribed, he will hold 450 of the 476 outstanding shares of stock in the applicant and will therefore control its operation. This fact is significant, Indiana continues, because Hilgenberg, a resident of Bloomington, expects to serve as the full-time general manager of the proposed station, whereas Rogers, a resident of Nashville, Indiana, has not specified the amount of time he will devote to the station. Thus, by incorrectly claiming that Hilgenberg rather than Rogers will have control of the station, Indiana asserts, Bloomington has concealed and misrepresented facts to the Commission in order to obtain a comparative preference for integration of ownership and management. As further evidence of Rogers' potential control over the applicant, petitioner states that David Rogers, who is Frank A. Rogers' cousin and attorney, is also a director of Bloomington.

3. In opposition, both Bloomington and the Broadcast Bureau note that all facts bearing on the ownership of the Bloomington corporation have been set forth in its application, and that Indiana has offered no evidence that these representations are incomplete or inaccurate. As a result, they continue, there is no basis for the allegation that the Commission has not been apprised of the necessary facts upon which to base its assessment of the applicants under the standard comparative issue. With respect to the question of who will actually control Bloomington, the Bureau maintains that Bloomington's application clearly demonstrates that Hilgenberg is now the majority owner and that at some time in the future, upon the exercise of his subscription rights, Rogers will become the majority owner of the corporation. Bloomington, in contrast, contends that Rogers, as a holder of Class A stock, will never gain control over the operation of the corporation, since its articles of incorporation give full voting rights only to Class B stockholders. Bloomington further contends that the somewhat distant familial relationship between Frank Rogers and David Rogers does not in and of itself raise a presumption that one will influence the other, citing *Northeast Oklahoma Broadcasting, Inc.* 42 FCC 2d 237, 27 RR 2d 524 (1973). In reply, Indiana asserts that since the Bureau's understanding is that Rogers will eventually control Bloomington and Bloomington maintains that Rogers will always have very limited rights, there is a serious question as to who will actually ultimately control Bloomington. Indiana also disputes Bloomington's assertion that Class A stockholders (Rogers) will have no influence over the operation of the corporation, arguing that Bloomington's articles of incorporation give Class A stockholders the authority to modify the rights of all shareholders, and that this authority could be used by Rogers to limit or veto Hilgenberg's actions in operating the station. Bloomington's claim that Hilgenberg will control the corporation is therefore erroneous and misleading, petitioner alleges, and the addition of issues inquiring into the control of Bloomington and possible misrepresentations on its part is justified under the circumstances.

4. Indiana also alleges that there are questions concerning the location of Bloomington's main studio which require the addition of its proposed issue (b) and the related part of issue (c). Petitioner notes that on February 16, 1973, Bloomington amended its application to specify a studio location at a site "to be determined" within the city of Bloomington. However, Bloomington now plans to locate its main studio at its transmitter site which is located outside of the city limits, Indiana asserts. As evidence of Bloomington's change in plans, petitioner submits the affidavit of Robert M. Petranoff, a principal of Indiana, who states that on October 1, 1973, David Rogers informed him that Bloomington plans to locate its studio at its transmitter site "if at all possible." In view of this conflict between Bloomington's application and its actual plans as described by David Rogers, issues inquiring into the location of Bloomington's main studio, the effect of the new studio proposal on its financial qualifications, and possible misrepresentation on its part are warranted, Indiana maintains. Further, even if Bloomington can establish that it will locate its studio within the city limits of Bloomington, Indiana continues, it should be required to specify a definite site, inasmuch as the other two applicants have specified definite sites for their studios—Indiana within the city limits of Bloomington and Henderson outside of the city limits—and it would be unfair to permit Bloomington to claim a studio location preference over Henderson on the basis of an indefinite commitment to locate its studio within the city.

5. Bloomington and the Broadcast Bureau both oppose Indiana's request on the grounds that Petranoff lacks personal knowledge of Bloomington's studio location plans, as required by Section 1.229(c). In any event the Bureau contends that the phrase "if at all possible" renders David Rogers' alleged representation so indefinite as to be meaningless. Bloomington, supported by an affidavit executed by David Rogers, challenges Petranoff's account of the October 1, 1973, conversation; in his affidavit, Rogers states that he told Petranoff at the meeting in question that he was not a competent spokesman for Bloomington, that his information was probably old, and that Petranoff should pursue his inquiry with Hilgenberg or Frank Rogers. Indiana in reply submits an affidavit from Petranoff in which he states that he has no recollection of these representations being related to him by David Rogers at their meeting.

6. The Review Board will deny the petition to enlarge issues. Indiana's allegation that Bloomington has concealed and misrepresented information bearing on its ownership is not supported by facts showing Bloomington's application to be inaccurate or incomplete and thus petitioner's concern about the control of Bloomington and the respective interests of its principals can be appropriately aired within the framework of the standard comparative issue. In this connection the Board is of the view that Indiana's allegations concerning possible future and undisclosed corporate reorganization are hypothetical and conjectural, and thus do not warrant the addition of a separate issue. The contention that Bloomington has misrepresented its proposed studio location is equally unpersuasive. Robert M. Petranoff lacks per-

sonal knowledge of Bloomington's studio location plans as required by Section 1.229(c) and his affidavit is therefore insufficient to support petitioner's claim in this regard. In an event, Bloomington's alleged motive for misrepresenting its studio location, a desire to earn a comparative preference, is unconvincing since comparative preferences are not awarded for in-city studio locations under the standard comparative issue. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). For the same reason, Indiana's request that Bloomington be required to specify a definite studio location must be rejected.

7. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed October 5, 1973, by Indiana Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74R-31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INTERNATIONAL RECORD CARRIERS' SCOPE OF OPERATIONS IN THE CONTINENTAL UNITED STATES, INCLUDING POSSIBLE REVISIONS TO THE FORMULA PRESCRIBED UNDER SECTION 222 OF THE COMMUNICATIONS ACT	Docket No. 19660 RM-690

MEMORANDUM OPINION AND ORDER

(Adopted January 30, 1974; Released February 4, 1974)

BY THE REVIEW BOARD:

1. The above-captioned proceeding is founded upon various petitions and requests proposing tariff revisions relative to the domestic handling of international record traffic by international record common carriers (IRC). The proceeding was first instituted by the Commission in its Notice of Inquiry and Proposed Rule Making, 38 FCC 2d 543, 37 FR 28303, published December 22, 1972. Subsequently, Western Union Telegraph Company (WU) requested that, pending an ultimate ruling on its original petition for increased share of the international message tolls, the Commission grant, without a hearing, an interim increase in the currently prescribed charges WU receives for handling outbound and inbound international messages. The Commission, after oral argument, designated WU's original petition and the interim request for hearing, 43 FCC 2d 661, 38 FR 30297, published November 2, 1973.[1] Presently before the Review Board are: (1) a petition to enlarge issues, filed December 13, 1973, by TRT Telecommunications Corporation (TRT); (2) a motion to amend issues, filed December 14, 1973, by Western Union International, Inc. (WUI); and (3) a motion to dismiss TRT's petition and WUI's motion, filed December 26, 1973, by the Trial Staff of the Common Carrier Bureau (Trial Staff).[2] The nature of the Trial Staff's motion to dismiss necessitates that we consider it first.

[1] By subsequent Memorandum Opinion and Order, FCC 73-1199, 38 FR 32966, published November 29, 1973, the Commission specified issues to determine: (a) the validity of the current division of charges between WU and the IRC's; (b) the revenues, expenses and investment attributable to WU's handling of international telegraph messages, both currently and for a reasonable future period of at least one year, and the corresponding changes required to meet WU's revenue requirements for the same period; (c) the effects of any increases in the current divisions of charges on the IRC's; (d) the effect of any increases relative to cost to the public and the corresponding effect on the volume of international message traffic and the resulting revenues to WU and the IRC's; and (e) what changes in light of findings and conclusions on (a)-(d) should be prescribed by the Commission which will be just, reasonable and in the public interest.

[2] Also before the Board are: (a) opposition to (1) and (2), filed December 27, 1973, by WU; (b) opposition to (2), filed December 28, 1973, by the Trial Staff; (c) opposition to (3) and reply to (a) and (b), filed January 8, 1974, by TRT; (d) opposition to (3), filed January 11, 1974, by WUI; and (e) reply to (a) and (b), filed January 18, 1974, by WUI.

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2. The gist of the Trial Staff's motion is that the Review Board has jurisdiction over interlocutory pleadings in cases of adjudicative and mixed adjudicative and rule making proceedings, citing Sections 0.365 (b) and 1.291(a)(2) of the Commission's Rules; and that since this proceeding is exclusively rule making, only the Commission has jurisdiction over the TRT and WUI pleadings under Section 1.291(a)(1) of the Rules. To support its contention that this proceeding is strictly rule making, the Trial Staff relies on Sections 1.1203 and 1.1207 of the Rules, which, it argues, delineate adjudicative and rule making proceedings in the context of restricted proceedings precluding *ex parte* presentations.[3] Specifically, it argues that the Commission Orders designating this proceeding for hearing and specifying the issues to be tried explicitly state that the hearing shall be conducted under Sections 201, 204, 205, and 222 of the Act—the same sections identified by Section 1.1207 as restricted rule making proceedings. See note 3, *supra*. The Trial Staff finds harmony among the "definition" in Section 1.1207, the definition of rule making by the Administrative Procedure Act (APA),[4] and this proceeding, which involves prescription of WU's charges for handling international telegrams, and the rates the IRC's may receive from the public.

3. TRT, in opposition, interprets the APA definitions as limiting rule making proceedings to statements of a rule of "future effect". Consequently, it argues that since this proceeding is founded on Section 222(e)(3) of the Communications Act, which provides for a redistribution of charges "after a full hearing" on whether the *existing* divisions are "unjust, unreasonable, or inequitable, or not in the public interest", it involves consideration of the status quo, which TRT avers is an exercise of adjudicatory authority. WUI, in its opposition,[5] argues that this proceeding is mixed adjudicative and rule making because, in effect, WU is suing four IRC's for substantial sums of money; and that, in addition to potentially involving tariff rates to be paid by the public, the case also involves a division of tolls which affect only specified parties, and not the general public. WUI also argues that the *ex parte* rules relied upon by the Trial Staff are not intended to "carve out an all embracing dichotomy" between adjudication and rule making.

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[3] Section 1.1203(a)(5) defines restricted adjudicative proceedings as "[a]ny proceeding conducted pursuant to the provisions of Sections 206, 207, 212, 214(a) or 221(a) of the Communications Act [of 1934, as amended]." The corresponding definition of restricted rule making proceedings is "[a]ny proceeding conducted pursuant to the provisions of Sections 201(a), 204, 205, 213(a), 214(d), 221(c) or 222 of the Communications Act." Section 1.1207(a) of the Rules.

[4] 5 U.S.C. § 551(5) defines rule making as "agency process for formulating, amending, or repealing a rule". A rule is defined in 5 U.S.C. § 551(4) as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing". 5 U.S.C. § 551(7) defines adjudication as "agency process for the formulation of an order", which, according to 5 U.S.C. § 551(6), "means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing".

[5] In its motion to amend issues, WUI makes the observation that "[i]n the event it is decided that the proper forum is the Commission WUI's instant motion should be deemed directed to the Commission."

4. The Review Board agrees with the Trial Staff that the Board has no jurisdiction over these interlocutory requests. Examination of the history of this proceeding leads us to the conclusion that it is exclusively one of rule making. What this phase of the proceeding involves is the reassessment of the formula prescribed under authority of Section 222(e)(3) of the Act for division of charges between WU, a domestic carrier, and other IRC's with respect to handling of international telegraphic messages. This reassessment necessarily has a "future effect" and comes within the meaning of the APA's definition of rule making in that it will prescribe "prices, facilities, appliances, services or allowances therefor [and] valuations, costs, or accounting or practices bearing on any of the foregoing". The fact that the investigation encompasses the question of current charges and practices does not therefore make it a mixed proceeding: the issue of the validity of existing charges and practices is merely ancillary to the primary question of whether a new division of charges should be prescribed.[6] See *Wilson & Co. v. United States*, 335 F. 2d 788, 796–97 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965); *accord*, *American Telephone and Telegraph Company v. FCC*, 449 F. 2d 439 (2d Cir. 1971); *Midwest Television, Inc. v. FCC*, 138 U.S. App. D.C. 228, 232–34, 426 F. 2d 1222, 1226–28 (1970).

5. Also, the requirement of "a full hearing" does not, in our opinion, imply that a quasi-judicial function is to be exercised by the Commission in this proceeding. Rather, the requirement of a full evidentiary inquiry serves to facilitate a comprehensive, accurate and efficient disposition of the object of the proceeding. See Administrative Conference of the United States, Committee on Rule Making, "Improvements in the Conduct of Federal Rate Proceedings", S. Doc. No. 24, 88th Cong., 1st Sess. 69, 80 (1963). Under Section 222(e)(3) of the Communications Act, Congress has simply provided for the same procedural safeguards in rule making as in adjudicatory proceedings. See, e.g., *Wirtz v. Baldor Electric Co.*, 119 U.S. App. D.C. 122, 337 F. 2d 518 (1963). Moreover, the cases[7] cited by TRT and WUI in support of this proposition were decided prior to the codification of the APA in 1946, 5 U.S.C. § 1001 *et seq.*, now 5 U.S.C. § 551 *et seq.* See 1 K. Davis, *Administrative Law* § 5.02, at 297 (1958). For the foregoing reasons, we are compelled to conclude that the Commission has exclusive jurisdiction over the interlocutory matters addressed to us.[8] However, rather than dismiss the pleadings, the Board believes that it would be more orderly and efficient to certify them to the Commission.

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[6] TRT's argument that this proceeding is really a complaint by WU against the IRC's is without merit, and, at most, ancillary to the principal object of the proceeding. Moreover, the fact that this proceeding involves specified parties does not imbue the case with adjudicatory characteristics. Section 222 was enacted in 1943 to deal with the merger of WU and the Postal Telegraph Company, WU's divestment of its international telegraph operations, and the division of charges for handling international telegraph traffic between WU and various IRC's; therefore, any proceeding under this section necessarily involves a small, specified group of parties. Notice of Inquiry, *supra*, 38 FCC 2d at 544.

[7] *Morgan* v. *United States*, 298 U.S. 468 (1936); *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370 (1932); and *Bimetallic Investment Company* v. *State Board of Equalization*, 239 U.S. 441 (1915).

[8] Reference to the sections of the Commission's *ex parte* rules, 1.1203 and 1.1207, as cited by the Trial Staff, serves to underscore our conclusion, but we need not rely exclusively upon these provisions.

6. Accordingly, IT IS ORDERED, That the "Motion of Trial Staff to Dismiss TRT Telecommunications Corporation Petition to Enlarge Issues, and Western Union International, Inc. Motion to Amend Issues", filed December 26, 1973, IS DENIED; and

7. IT IS FURTHER ORDERED, That the "Petition of TRT Telecommunications Corporation to Enlarge Issues", filed December 13, 1973, and the Motion to Amend Issues, filed December 14, 1973, by Western Union International, Inc., and all related pleadings, ARE CERTIFIED to the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 74–31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
JEFFERSON-PILOT BROADCASTING CO.
For the Issuance of a Certificate Pursuant to Section 1071 of the 1954 Internal Revenue Code (26 U.S.C. 1071)

JANUARY 19, 1974.

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE 1954 INTERNAL REVENUE CODE (26 U.S.C. 1071)

On January 9, 1974, the Federal Communications Commission granted its consent to the assignment of the licenses of Stations WQXI–AM–FM Atlanta and Smyrna, Georgia, respectively, from Pacific and Southern Company, Inc. to Jefferson-Pilot Broadcasting Company.

It is hereby certified that the above assignment of the licenses of Stations WQXI–AM–FM was necessary or appropriate to effectuate compliance with the rules and policies in regard to ownership and control of broadcast facilities, and, more particularly, to effectuate compliance with the one-to-a-market policy of the Commission as subsequently incorporated in the Rules, Sections 73.35 (Note 7) and 73.240 (Note 7), of the Commission (effective May 15, 1970).

This certificate is issued pursuant to the provisions of Section 1071 of the 1954 Internal Revenue Code.

In witness whereof I have hereunto set my hand and seal this 9th day of January, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-73

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF LOWER COLUMBIA BROADCASTING CO., LICENSEE OF RADIO STATION KVAS, ASTORIA, OREG.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 23, 1974; Released January 30, 1974)

BY THE COMMISSION:

1. The Commission has under consideration an application for remission, filed on April 16, 1973 by the licensee of Radio Station KVAS, Astoria, Oregon, requesting that the Commission "waive" the forfeiture of five hundred dollars imposed by the Commission's Memorandum Opinion and Order adopted on March 13, 1973.

2. The forfeiture was assessed for repeated violations of Sections 73.93 and 73.113 of the Commission's Rules and Section 318 of the Communications Act of 1934, as amended, in that the transmitter was operated on forty-two days during the period December 5, 1970 through February 21, 1971 by an employee who had no operator's license or permit for broadcast purposes, who also signed the station's operating logs. The operator had held a Provisional Operator's Certificate which expired on December 3, 1970.

3. The application to "waive" will be treated as an application for mitigation or remission made under Section 1.621 of the Commission's Rules and Section 504(b) of the Communications Act of 1934, as amended. In its application the licensee admits the violations but states that the unlicensed operator was a trained and well-qualified operator whose license unfortunately "expired" and that the licensee never hired an unlicensed or unqualified operator. The licensee further states that it has performed an outstanding public service in the area and that the forfeiture will affect its community service "as it is a financial hardship that is amplified due to the size of our [small market] station."

4. Actually the operator held a Provisional Operator's Certificate which was valid for a period not to exceed twelve months and was not renewable under Section 13.8 of the Commission's Rules, so that it cannot be said to have been a license which "expired." The licensee's financial condition was considered prior to the adoption of the Memorandum Opinion and Order of March 13, 1973. Licensees are expected to comply with the technical rules of operation as well as to make continued efforts to serve the community to which they are licensed and

will not be relieved of liability for violations of the Rules by the fact that they have fulfilled their responsibility to serve their communities. *Esther Blodgett*, 18 FCC 2d 6 (1969); *Folkways Broadcasting Co.*, 12 FCC 2d 887 (1968). Considering all the circumstances in this case, we are not persuaded to remit or mitigate the forfeiture.

5. Accordingly, IT IS ORDERED, That licensee's application for mitigation or remission of forfeiture filed on April 16, 1973, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF PACIFIC BROADCASTING CORP., LICENSEE OF STATIONS KUAM, KUAM-FM, AND KUAM-TV, AGANA, GUAM
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 23, 1974; Released January 30, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated February 27, 1973 issued to Pacific Broadcasting Corporation the licensee of Stations KUAM, KUAM-FM, and KUAM-TV, Agana, Guam and (2) the licensee's response thereto dated May 29, 1973.[1]

2. The Notice of Apparent Liability for forfeiture in the amount of ten thousand dollars ($10,000) was issued to the licensee for willful or repeated violations of the Commission's Rules, namely, Section 73.111(a) in operation of Station KUAM, Section 73.281(a) in operation of Station KUAM-FM, and Section 73.669(a) in the operation of Station KUAM-TV. In the case of all three stations, the violations consisted of falsification of the operating logs by two operators, holding first-class radiotelephone licenses, who affixed their signatures to the logs as operators on duty in charge of the transmitting apparatus for periods of time during which they were not physically present on duty at the stations and were therefore without actual knowledge of the facts reflected by the entries made in the logs. The dates, times, and hours in 1972 of such falsifications by one of the operators, as revealed by an inspection of the operating logs of Station KUAM on April 15, 1972 and by an inspection of the operating logs of Station KUAM-FM on April 22, 1972, were as follows:[2]

[1] Extensions of time within which to file the response were granted to the licensee by Chief, Broadcast Bureau, pursuant to delegated authority.

[2] The operator stated that as near as he could recollect, his work was scheduled from 9:00 a.m. to 5:00 p.m. on Monday through Friday each week and that for a time on Thursdays in early 1972 he was scheduled to work from 5:00 p.m. to sign-off.

Dates	Times	Hours
Station KUAM:		
Mar. 11–12	0530 to 0015	18 hours 45 minutes.
Mar. 18–19	0530 to 0015	Do.
Mar. 19–20	0730 to 0015	16 hours 45 minutes.
Mar. 22–23	0530 to 0015	18 hours 45 minutes.
Mar. 23–24	0530 to 0015	Do.
Mar. 25–26	0530 to 0015	Do.
Mar. 26–27	0630 to 0015	17 hours 45 minutes.
Mar. 27–28	0530 to 0015	18 hours 45 minutes.
Mar. 30–31	0530 to 0015	Do.
Apr. 1–2	0530 to 0015	Do.
Apr. 3–4	0700 to 0015	17 hours 15 minutes.
Apr. 4–5	0530 to 0015	18 hours 45 minutes.
Station KUAM–FM:		
Mar. 2–3	0830 to 0015	15 hours 45 minutes.
Mar. 3–4	0845 to 0015	15 hours 30 minutes.
Mar. 6–7	0845 to 0015	Do.
Mar. 7–8	0845 to 0015	Do.
Mar. 10–11	0845 to 0015	Do.
Mar. 11–12	0845 to 0015	Do.
Mar. 14–15	0845 to 0015	Do.
Mar. 15–16	0845 to 0015	Do.
Mar. 17–18	0845 to 0015	Do.
Apr. 12–13	0830 to 0015	15 hours 45 minutes.

The dates, times, and hours in 1972 of such falsifications by the other operator, as revealed by an inspection of the operating logs of station KUAM–TV on April 26, 1972, were as follows: [3]

Dates	Times	Hours
Station KUAM–TV:		
Mar. 17–18	0845 to 0015	16 hours 30 minutes.
Mar. 18–19	0900 to 0145	16 hours 45 minutes.
Mar. 19–20	1155 to 0030	12 hours 35 minutes.
Mar. 20–21	0915 to 0100	15 hours 45 minutes.
Mar. 21–22	0925 to 0045	15 hours 20 minutes.
Mar. 22–23	0915 to 0130	16 hours 15 minutes.
Apr. 1–2	0900 to 0145	16 hours 45 minutes.
Apr. 2–3	0830 to 0030	16 hours.
Apr. 6–7	0845 to 0045	Do.
Apr. 7–8	0830 to 0130	17 hours.

3. As stated in the Notice of Apparent Liability, the Commission was in possession of additional information relating to these violations, as follows: Each of the operators involved in the falsifications personally received a Notice of Violation (Form 793–A) specifically describing the aforesaid dates, times, and hours for which falsified entries were made, and notifying the operator that he had signed the operating logs indicating that he was on duty in actual charge of the transmitting apparatus during the specified periods when he was not present on duty. Relating to KUAM–TV, the Chief Engineer replied to this Notice by letter dated November 1, 1972, which reads in pertinent part as follows:

DEAR SIRS: In answer to your form 793 dated October 19, 1972 and your letter dated October 30, 1972, I offer these comments.

73.669(a) I did sign the logs as you indicated on the advise of my superior, Mr. William Neilsen, as we had no other licensed engineer on duty at the times indicated.

[3] The operator stated that his time at the station varied but that on the average his shift was from 8:00 a.m. to 5:00 p.m., except Sundays.

At the time Mr. William Neilsen was Executive Vice President of the licensee and General Manager of the three stations.

4. In regard to station KUAM the other first-class operator named in the Notice replied thereto by letter dated October 29, 1972 which reads in pertinent part as follows:

> GENTLEMEN: This letter is written in response to your query dated October 19, 1972, concerning my noncompliance with Federal Communications Commission Rules, Section 73.111(a).
>
> I would like to state that I signed the operating log of Standard Broadcast station KUAM, Agana, Guam, on the dates indicates, namely March 11, 1972 through April 4, 1972, pursuant to instructions from the then Chief Engineer, William J. Beall. Mr. Beall advised me that either I signed said logs, even though I was not personally in attendance, or my employment would be terminated. I had incurred considerable expense in making an employment change from Nebraska to Guam and it would have been financially disastrous to me and my family to lose employment.
>
> Even though I was not personally in attendance during all of the hours signed by me on the operating logs, I lived right above the station and was available during most of these hours.
>
> I questioned the legality of my signing said logs at the time. However, as stated previously, I was told I would be of no value to the company if I did not do so.
>
> I have reviewed Section 73.111(a) of the Federal Communication Rules and realized the seriousness of this violation. My only defense is as stated above and I would like also to state that since April 4, 1972, I have not and will not, sign any operating logs except during hours I was personally in attendance.

This operator also replied by letter dated November 28, 1972 to the Notice of Violation issued to him for the falsifications of the KUAM–FM operating logs. The reply is identical to his reply regarding KUAM except for substitution of "Section 73.281(a)" in lieu of "Section 73.111(a)" and substitution of the dates of the period wherein falsifications were made by him at KUAM–FM as above specified. In the Notice of Apparent Liability the licensee was notified that these responses of the operators "provide evidence that these violations by the licensee were willful." In reaching this conclusion we also considered the licensee's replies to the Notices of Violation issued for these violations in which, among other things, the licensee stated (1) that "while it may or may not be true that the chief engineer was physically present in the KUAM–TV room during all of this time [signed for], there were third class operators present in the building" (2) that the two first class operators live on station property and that "it is conceivable that they [were] not always present in the control room" and that the two first class operators "cover the overall operation and sign logs due to refusal of other operators to sign logs."

5. The licensee's response of May 29, 1973 to the Notice of Apparent Liability is primarily a request for remission or reduction in the amount of forfeiture. However in regard to the factual basis for the violations, the licensee states:

> The purpose of this letter is to set forth reasons why the amount of the liability should be reduced or remitted. At the outset, it is noted that the licensee has no basis for contesting the essential facts which underly the Notice of Apparent Liability, i.e., that the entries on the operating logs for the specified dates were not factual and that, therefore, the logs were "falsified". Although the licensee does not have independent information to support the Commission's description of the reasons for such falsification, the licensee recognizes that under

the Commission's decisions it is responsible for the rule violations which were committed by its employees.

Thus the licensee admits the facts of falsification insofar as that the operators were not present on duty during the periods for which they signed the logs, and that the licensee is responsible for the violations of the Commission's Rules committed by licensee's employees. Although the licensee does not expressly admit that it was responsible for instructing its Chief Engineer to falsify the logs or for the extension of such instructions to the other first-class operator, we note that prior to making its response to the Notice of Apparent Liability the licensee had available to it a copy of the reply of the Chief Engineer and failed to comment upon the express charges made in the Chief Engineer's letter. Further we note that the licensee makes no response regarding the matters described in the Notice of Apparent Liability as providing "evidence that the violations were willful."[4] Based upon the foregoing, we find that the licensee violated Section 73.111(a) of the Commission's Rules in the case of Station KUAM, Section 73.281 (a) of the Rules in the case of Station KUAM–FM, and Section 73.669(a) of the Rules in the case of Station KUAM–TV, and that in each case the violations were willful and repeated.

6. In support of the request for remission or reduction of the forfeiture, the licensee states that it has adopted procedures to prevent a recurrence of the violations, that the licensee has had difficulty in the past employing qualified licensed operators and that the Commission has recognized the licensee's difficulties in obtaining first-class operators for the stations.[5] Also licensee requests that the Commission consider that the stations operate many hours in excess of the minimum hours of operation required by the Rules, that the imposition of this forfeiture will result in financial hardship to the licensee, and that the licensee has expended large sums of money for improved facilities, particularly in connection with providing video tapes for use by Station KUAM–TV.

7. Licensees are expected to comply with the technical rules of the Commission as well as to make continued efforts to serve the community to which they are licensed. *Henryetta Radio Co.*, 21 FCC 2d 825 (1970). A shortage of available employees in the area does not justify violation of the Rules. *The McAllester Broadcasting Co.*, 20 FCC 2d 439 (1969). We believe that it should have been clear to the licensee that any action by the Commission granting temporary waivers of Section 73.661 of the Commission's Rules (permitting the use of third-class operators at the television station) would provide no excuse whatsoever for licensee's willful and repeated falsification of the logs of the three stations. We considered the licensee's financial condition prior to the adoption of the Notice of Apparent Liability in this proceeding and we observe that no significant change has occurred in licensee's financial condition, as augmented by its financial data for the

[4] The Commission's records indicate that as of the date of the filing of the licensee's response Mr. William Neilsen was still a Vice President of the licensee and thus available to make comment upon or deny the giving of the instructions to falsify.

[5] The Commission by letter dated May 16, 1973 permitted the use of third-class operators at KUAM–TV until February 1, 1974, and had previously granted such waivers in regard to KUAM–TV.

year 1972, which, when considering all of the circumstances of this case, would merit a reduction in the amount of forfeiture. With respect to whether operation of the stations with customary programming for periods longer than the minimum required by the Commission's Rules should be awarded recognition as grounds for reduction, we have held that licensees will not be relieved of liability for violations of the Rules by the fact that they have fulfilled their responsibility to serve their communities. *Esther Blodgett*, 18 FCC 2d6 (1969), *Folkways Broadcasting Co.*, 12 FCC 2d 887 (1968). Having considered all of the grounds upon which the licensee relies for remission or mitigation we are not persuaded to remit or reduce the amount of forfeiture.

8. In view of the foregoing, IT IS ORDERED, That Pacific Broadcasting Corporation, licensee of Stations KUAM, KUAM–FM, and KUAM–TV, Agana, Guam FORFEIT to the United States the sum of ten thousand dollars ($10,000) for willful and repeated violations of Sections 73.111(a), 73.281(a) and 73.669(a) of the Commission's Rules. Payment of this forfeiture may be made by mailing to the Commission a check, or other similar instrument, drawn payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–80

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE "PRIME TIME ACCESS RULE", SECTION 73.658(k), OF THE COMMISSION'S RULES	
Petitions of	Docket No. 19622
NATIONAL BROADCASTING CO., INC. (NBC)	RM–1967
MIDLAND TELEVISION CORP. (KMTC, SPRINGFIELD, MO.)	RM–1935
	RM–1940
KINGSTIP COMMUNICATIONS, INC. (KHFI–TV, AUSTIN, TEX.)	RM–1929
(For Deletion of the Rule)	
MCA, INC.	
(To Permit Use of "Off-Network" Material Plus 25% New Material)	

REPORT AND ORDER

(Adopted January 23, 1974; Released February 6, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ISSUING A SEPARATE STATEMENT; COMMISSIONERS REID AND WILEY CONCURRING AND ISSUING STATEMENTS.

INTRODUCTION

1. This proceeding—a general exploration of the "prime time access rule" (Section 73.658(k) of our Rules), whether it should be retained or rescinded, what modifications should be made in it if retained, and (in the Inquiry portion of the proceeding) possible extensions of its scope and application—was begun by Notice of Inquiry and Notice of Proposed Rule Making adopted October 26, 1972 (FCC 72–957, released October 30, 1972, 37 F.R. 23349, 37 FCC 2d 900).[1] After various extensions of time, initial comments and reply comments were filed by January 15 and March 12, 1973 respectively, and after a Notice of Oral Argument issued June 18, 1973 (41 FCC 2d 519), oral argument was held in the proceeding on July 30 and July 31, before the Commission en banc.

2. A total of some 40 comments and 15 initial reply comments were filed through March 12, including filings by the three national tele-

[1] Section 73.658(k) has three sub-paragraphs. (1) sets forth the basic limitation: stations in the top 50 markets may not carry more than three hours of network programs during prime time each evening. (2) is an exemption for certain network news coverage and political broadcasts. (3) provides that the time cleared of network programs may not be filled with off-network programs, or feature films shown in the market within the last two years.

vision networks and ABC and CBS Affiliate groups, newly formed "independent producer" and independent station associations, seven "major" film production companies and other program producers filing individually, TV station licensees, union and professional groups in the program production industry, and other parties including the American Civil Liberties Union. A total of 54 persons, representing some 36 organizations or themselves, participated in the oral argument, including representatives of 20 entities which had not earlier in the proceeding participated. Some of these also filed formal comments after March.

3. As discussed hereinbelow, and spelled out in Appendix A hereto, Section 73.658(k) is amended in substance as follows:

(a) There are no more restrictions on the programs which stations subject to the rule (network outlets in the top 50 markets) may carry during what is now the first half-hour of prime time (7–7:30 p.m. E.T. and P.T., 6–6:30 p.m. C.T. and M.T.).

(b) The only other restrictions are as to the second-half hour of what is now the access period (7:30–8 p.m. E.T. and P.T., 6:30–7 p.m. C.T. and M.T.), Monday through Saturday. Stations subject to the rule must devote at least 5 of these half-hours to material which is not network, off-network or feature film, and must devote a sixth half-hour to such use unless it is devoted to network or off-network programs which are children's "specials" or documentary or public affairs programs (the latter are defined as any program which is non-fictional and educational or informational, but not including programs where the information is used basically as part of a contest among participants).

(c) Although not stated in the rule, it is expected that some of the five or six half-hours thus "cleared" of network, off-network and feature film material will be used by stations for programs relating to minority affairs, children's programs, or other programs directed to the needs and problems of the station's community and coverage area, as disclosed in its ascertainment process.

(d) The new rule also contains provisions relating to time-zone differences, and sports "runovers" to the small extent necessary now that there are no restrictions on the 7–7:30 p.m. period. It is also stated that the Commission will be much more stringent with respect to some types of waivers than it has been up to now.

I. BACKGROUND OF THE RULE AND GENERAL DESCRIPTION OF THE COMMENTS

A. Background

4. The matter of "network dominance" in radio and later in television, and its various aspects, have been the subject of Commission concern since the 1930's, an early proceeding leading to the adoption of the "chain broadcasting rules" in 1941. The rules adopted at that time, pertaining to radio networks, are essentially those still applying in the AM and FM aural services (Sections 73.131–73.138 and 73.231–73.238).[2] Shortly thereafter these rules were made applicable with-

[2] These include rules as to exclusive affiliation, territorial exclusivity given stations by networks, term of affiliation, time optioning, retention by station of right to reject network programs, network ownership of stations, restrictions on dual network operation, and prohibition of network control over station rates for non-network time.

out substantial change to television, as several paragraphs of what is now Section 73.658, and various additions to the television regulations have been made since as that medium has become more and more important.

5. The regulation which later became the "prime time access rule" was originally proposed by Westinghouse Broadcasting Company, Inc. (Westinghouse), long a major multiple owner of TV stations as well as a producer and distributor of non-network TV programs, in the proceeding around 1960 concerning the restriction or prohibition in television of the "option time" practice (Docket 12859). Under this practice (which still obtains in radio), stations affiliated with national networks give their network an "option" on certain times of day (usually in their affiliation agreements) without the network's yet having scheduled a particular program during such hours. Westinghouse supported the retention of the three hours of evening option time previously permitted under the rule, but also urged that the networks be limited to that amount of prime-time broadcasting over their affiliated stations, thus freeing an hour of desirable evening "prime" time for non-network sources.

6. In the May 1963 decision of Docket 12859 prohibiting the time-optioning practice in television as an undesirable restraint on licensee programming judgments, the Commission refused to adopt the Westinghouse proposal, stating as follows (*In the Matter of Amendment of Section 3.658(d) and (e) of the Commission's Rules and Regulations to Modify Option Time and the Station's Right to Reject Network Programs*, 34 FCC 1103.1131):

> 68. All of these proposals, particularly those which would limit station access to network programing, involve a restraint on the licensee's freedom of choice with respect to programing his station. As mentioned above, we are reluctant to impose such restraints, or permit their imposition, unless it is clear that they are required in the public interest. In deciding herein to prohibit option time or any arrangement having a similar restraining effect, we have acted to remove a major restraint which has long existed in the industry. Before considering further measures of a restraining nature, we believe it is appropriate to await developments with the industry simply operating without option time or similar arrangements. We do not say that the public interest would never be served by action along some of the lines just mentioned; if it so appears, of course such action will be considered. But for the present, with the major step taken herein, it would be premature to consider further measures until we have the benefit of observation of future developments.
>
> 69. In short, for the present we believe that programing in television should be left to free operation of the forces of competition, with programs from all sources obtaining exposure on their merits.

7. *The 1965 proposal in Docket 12782.* Docket 12782, the proceeding in which the prime-time rule and other restrictions on the three national networks were adopted in 1970, began in 1959 as an investigatory proceeding (an outgrowth of the general Network Study begun in 1955). The designating Order set forth the general area as "the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition", followed by more specific issues concerning network control over programming.

8. Following extensive hearings, in November 1962 the Office of Network Study reported to the Commission, concluding *inter alia* that

network policies unduly restrict creative and economic competition in TV programming development, and substantially impede entry by independent program producers into network TV program markets; and that networks control the source of supply of programs and dominate competition in both network and syndication markets. On the basis of this report, in March 1965 the Commission issued a Notice of Proposed Rule Making in Docket 12782, proposing two types of restrictions on the three national networks: (1) prohibition of their engaging in domestic syndication or sharing in the profits thereof, engaging in foreign syndication of any programs not wholly produced by the network, or acquiring any right, beyond that of network exhibition, in any program not wholly network-produced; and (2) limitation on the amount of their evening entertainment schedules which the networks may fill with programs which they themselves own, to 50% of the 6–11 p.m. schedules excluding news. In other words, 50% of network evening schedules (except news) must be programs for which the licenses are held by other parties—generally sponsoring advertisers or producers—rather than programs owned and controlled by the networks.

9. Stating that the networks had progressively achieved "virtual domination of network program markets", the Notice stated the purpose of the proposed rules to be:

> (a) to provide opportunity for entry of more competitive elements into the market for television programs for network exhibition; and (b) to encourage the growth of alternate sources of television programs for both network and non-network exhibition (evening programs only).

Three main lines of development were specifically noted as contributing to the unsatisfactory situation:

> (a) the near-elimination from network evening schedules of independently provided, advertiser-controlled programs, and their replacement by programs which, while the networks do not usually produce them themselves, are generally licensed to and controlled by them, both creatively and economically, with a view toward providing "bulk circulation" to appeal to "mass advertisers."[3] Between 1957 and 1964, "independently provided" programs fell from 32.8 to 6.9% of network evening hours, while the total of network-produced and "network participation" programs rose from 67.2 to 93.1%.
>
> (b) the concomitant practice of the networks' acquiring non-network interests or rights in the programs taken for network exhibition, such as sharing in the profits from the network run or later syndication, the entire right to distribute in syndication here or abroad, etc., to the substantial detriment of independent producers thus forced to give up these rights.[4]
>
> (c) the expansion of the networks' role in domestic and foreign syndication, and, indeed, the growth of "off-network" programming, distributed both by them

[3] It was recognized that this change involved many possible aspects: the network desire to maintain bulk circulation, increased production costs, and more sophisticated advertising and marketing techniques, including advertiser desire to cut risks by spreadng expenditures over several programs on a "participation" basis rather than sponsoring a single program.

The comparatively small extent to which networks themselves produce entertainmnt programs, which actually declined between 1957 and 1964, was not regarded at particularly a problem.

[4] It was stated that these developments together have the following results as to network programs: (a) concentration of economic, proprietary and creative control of program production and procurement in the networks; (2) concentration of residual rights in the networks; and (3) limiting the network-program market available to producers to the three network buyers, thus restricting the profitability of independent producer operations—in sum, to centralize control of what is available to the American public and hamper the competitive development of "diverse and antagonistic sources."

and by other syndication distributors, so as to constitute the bulk of syndicated material on which stations not network-affiliated must largely rely. This has become largely "off-network", and "the first-run syndication market appears to have virtually disappeared."

10. By way of tentative conclusions from these developments, the Commission observed that this concentration of control over the nation's TV programs appeared contrary to the public interest in several ways: the traditional public interest in diversification rather than concentration of control over the mass media; decreasing the competitive opportunities for independent program producers, who must deal with the networks on their own terms or give up hope of obtaining network access; and the needs of additional TV stations, particularly UHF stations, will require a vigorous independent syndication industry, whereas that industry has in fact shown a steady decline. As to the "50–50" part of the proposed rules, it was stated that this was designed "to place independent producers and network sponsors in a position to bargain on something approaching an even basis with network corporations in the program production process" and to "broaden the market to which an independent producer could take his wares and hence, foster and encourage competition among such producers . . .". "The principle function of the proposed rule is to promote diversity of sources of network programs and thus to broaden the base from which such programs may be selected by network corporations for their schedules."

11. The 1965 Notice also referred to the concept that strict adherence to principles of free competition might perhaps indicate that the networks should be barred entirely from the production and ownership of TV programs. It was stated that it did not appear that the public interest in a nationwide service would be furthered by eliminating the networks entirely from the production and procurement process; but, on the other hand, permitting existing network dominance to continue would likewise injure the public interest and act as a stricture on the "larger and more effective" use of television channels in the public interest.

12. *The 1970 decision in Docket 12782.* After the 1965 Notice of Proposed Rule Making, comments were filed until mid-1966, those of Westinghouse renewing the "Westinghouse proposal" which had not been adopted in the option-time decision. In September 1968, oral argument in the proceeding was ordered, specifically inviting comment on the Westinghouse proposal and also permitting parties to submit current data. Oral argument was finally held in July 1969; in May 1970 the Commission issues its decision (*In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting* (Docket 12782), 23 FCC 2d 382).

13. In this decision, the Commission adopted the "syndication" and "financial interest" rules substantially as proposed in 1965 (new Section 73.658(j)), and, instead of the proposed "50–50" rule, the Westinghouse proposal to limit the amount of permissible network prime-time programming each evening. With respect to the "50–50" proposal, it was stated (par. 4 of the decision) that the Commission was not per-

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suaded that it was unworkable or would have adverse consequences (as various parties had urged), but rather that it would achieve the desired purpose without untoward side effects. However, we also noted ABC's contention that it would be harmed by the proposal vis-a-vis the other two networks (since advertisers had in the past tried to use other networks because of their more complete U.S. coverage), and that the Westinghouse proposal would be a more direct way of opening up time outside the network "funnel" for non-network sources. Accordingly, the latter was adopted, the "50–50" proposal being held in abeyance for the time being to see if the other approach would achieve the intended purpose.

14. The decision set forth "reasonably simple and . . . quite compelling" facts and considerations leading to adoption of the rules mentioned. These included: (1) the great importance of the national networks in U.S. television, in terms of the percentage of stations which are affiliated and the small amount of non-network programs presented during evening hours (most of it "off-network"), the decrease (1958–1968) of first-run syndicated evening programming and the increase in "off-network", on independent and affiliated stations alike; (2) the virtual disappearance of advertisers themselves as customers for programs, meaning that all would-be program suppliers have to deal with three customers, and all—even well-established suppliers and the "major" film producers—have had to give up subsidiary interests in their programs to the networks (in 1968, the amount of "independently provided" programs in evening network schedules had declined to 3.3%, from 6.9% in 1964); (3) the fact that a healthy syndication industry requires an adequate basis of stations to use its product, but it faces the "insurmountable advantage" which the networks have in dealing with their affiliates, with semi-permanent affiliation relationships and a much simpler distribution process—an advantage "inherent in the distribution process and not in the product"; (4) Changes in advertising and marketing techniques, so that, instead of former individual or alternate sponsorship, 90% of evening network time is sold on a "participating" basis with advertisers simply buying commercial minutes or half-minutes in various programs; (5) network control of the production process "from idea through exhibition", which applies to network programs and, through the use of "off-network" material, the bulk of non-network material as well; (6) use of this control to achieve large circulation—and therefore get advertisers interested in "low cost per thousand" figures—at the expense of program diversity (which, to the extent it is present with books, plays and motion pictures, is simply impossible in the network system); and (7) greatly increased network activity in the non-network distribution of programs (syndication) or profit shares therein, with a close relationship between the programs selected for network exhibition and those in which the networks acquired these and similar interests. See decision, pars. 6–20, 23 FCC 2d 385–393.

15. The total situation was described as unhealthy in several respects, with complete and excessive control in the networks, working against the diversity of approach which would likely prevail if producers could develop shows for both network and syndicated distribu-

tion; and with independent producers unable to get access to large evening audiences for first-run syndicated material and hence unable to develop programs for use by new UHF and other independent stations. Therefore, the public interest requires a "limitation on network control and an increase in the opportunity for the development of truly independent sources of prime time programming" by opening up a half-hour of prime time each night. This could not be permitted to be filled with off-network material; "to permit this would destroy the essential purpose of the rule to open the market to first-run syndicated programming". The same was true of the use of feature film. The Commission expressed the view that this "modest action" would provide an impetus to the development of independent program sources, and thus an increased supply of programs, for independent as well as affiliated stations (thus benefitting UHF), as well as increased local programming. It was stated that it may be hoped that diversity of program ideas would increase also. As to the reasons advanced in the 1963 option time decision for not adopting the Westinghouse proposal, it was stated that the record since shows that the prohibition of that practice has not improved the network-control problem, so that the Westinghouse proposal is appropriate for adoption now even though the Commission did not do so before. See pars. 21–23 of decision, 23 FCC 2d 394–396.

16. With respect to the argument of a number of parties that the rule would simply not result in programming from non-network sources comparable in character to that of the networks which it would replace, it was stated that while there was a conflict in the record, the Commission found no compelling reason why such programming should not be forthcoming from independent producers. With respect to arguments concerning the very high production costs of such material, it was stated that advertisers may be expected to pay what they have to in order to reach such large prime-time audiences; and that, while this question cannot be determined with absolute certainty in the absence of operating experience, the chance of success is sufficiently great that the opportunity should be made available to independent production. If the rule fails to achieve its purpose, it can readily be changed or rescinded. (Par. 24, 23 FCC 2d 396–397).

17. It was emphasized that the Commission did not intend to "carve out a competition-free enclave for syndicators", nor to smooth their path nor promote the production of any particular type of program. "The types and cost levels of programs which will develop from opening up evening time must be the result of the competition which will develop among present and potential producers." In other words, the objective is "to provide opportunity—now lacking in television—for the competitive development of alternate sources of television programs so that licensees can exercise something more than a nominal choice in selecting the programs they present" . . . and "to make available an hour of top-rated evening time for competition among present and potential non-network program sources seeking the custom and favor of broadcasters and advertisers so that the public interest in diverse broadcasting service may be promoted". See pars. 24–26, 23 FCC 2d 396–397. At the end of the decision (par. 37), in connection

chiefly with the use of "independently provided" programs in network schedules, the Commission also stated that "Diversity of programs and development of diverse and antagonistic sources of program service are essential to the broadcast licensee's discharge of his duty as 'trustee' for the public in the operation of his channel." [5]

18. Chairman Burch issued a dissenting statement to this decision, joined in by one other Commissioner. His chief point was that, however laudable the motives of those Commissioners voting to adopt the rule, the economics of the situation simply preclude the development of comparable non-network programming for the "cleared" portion of prime time. Unlike the networks, independent suppliers cannot count on "selling" most of the top 50 markets, and the "fractionated top 50 market" simply will not sustain quality programming effort, in view of the very high present costs of program production. He also predicted little diversity, with more game shows and light entertainment, following "tried and true" lines, with the economics of the situation likely to dictate programming produced with reduced resources. As he saw it, harm would come to the public in the major markets, through loss of high-quality network programs without any real chance of replacement, to small-market stations and viewers because these markets can even less support expensive program efforts, and to independent stations (particularly UHF) because they will have to compete with VHF affiliates for non-network material to fill the vacated portions of prime time. He favored reliance on the promotion of other forms of television, such as subscription TV and cable, as the most promising approach to the "diversity" question. Along with Commissioner H. Rex Lee in a concurring statement, Chairman Burch also expressed dissatisfaction with the failure to afford a wider exemption to networks news and public-affairs broadcasts. Commissioner Lee also said in his statement that if the networks actually cut back their prime-time schedules "across the board" to three hours a night—as they said they would and later did—this would be definitely contrary to the public interest and the Commission should consider remedial action. See 23 FCC 2d 411–16, 428–29.[6]

19. *The August 1970 decision on reconsideration.* Numerous parties sought reconsideration of the May 1970 decision in Docket 12782; these were disposed of in a Memorandum Opinion and Order issued August 7, 1970, generally affirming the rule (25 FCC 2d 318). As to the basic substance of the prime-time access rule, this decision dealt chiefly with two lines of argument: (1) the character of the programming which would result, and (2) the possible impact on small-market affiliated stations if the networks cut back their prime-time programming throughout the country to 3 hours a night, as they did. As to the first, the decision noted that this was the subject of conflicting predictions in the record (as noted above), and that a number of independent producers had come forward since the May decision, expressing hopes and plans for the production of prime-time material. The same

[5] In summarizing this decision, and the later decision on reconsideration issued August 7, 1970, discussed below, we have not included the discussion relating particularly to the "syndication" and "financial interest" rules which are not involved here. We have also not included the detailed discussion in this decision of the "50–50" proposal (Appendix II).

[6] Former Commissioner Cox also had a concurring statement. See 23 FCC 2d 416–428.

conclusion reached before was affirmed. See 25 FCC 2d 325–326. One aspect of the matter noted was the benefit from the rule to local and regional advertisers, who again have opportunity to buy time in, or even sponsor completely, syndicated prime-time programs, whereas they cannot afford to participate in national network programs. As to the small-market impact, the decision analyzed in some detail the potential costs and revenues to these stations if the networks reduced their schedules. It was concluded that the only small-market stations which might be seriously affected are the 58 with annual revenues of less than $1,000,000, of which 33 reported losses in 1969. These might lose income in amounts ranging from zero to about $44,000 a year. The decision concluded that this should not be enough to cause the demise of any of these stations, though it could affect their local and other non-network programming; and that, in view of the small amount of the nation served by these stations (3% for the 58 stations, 1½% by the 33 Stations), "we consider the disadvantage occasioned these few stations to be outweighed by the public interest benefits in a more diverse and competitive broadcast market." (25 FCC 2d 329)

20. One other aspect of this matter noted was the high degree of dependence which these station licensees appear to have on the networks, if a half-hour reduction in network schedules causes them such concern. It was stated (25 FCC 2d 329–330):

> . . . This confirms our conclusion that our television broadcast structure is overcentralized and poses a serious question as to whether the basic concept of a competitive, locally responsible television structure as envisioned by Congress and this Commission is being implemented. One principal objective of our Prime Time Access Rule is to lessen the degree of network domination of station operation. The stations in effect are pleading this domination as an element essential to their economic viability. If, as many licensees say in their letters and petitions, affiliates at present are so dependent on national networks that their economic viability and their ability to serve the public interest turn on whether they continue to receive revenues from an additional half-hour of network programming, they clearly are not in a position to exercise the appropriate freedom of choice and the responsibility for television service which are essential to the proper discharge of their broadcast trusteeships. [Footnote 26 omitted] The present degree of network dominance of television broadcasting, now so graphically confirmed by the letters and petitions filed on reconsideration herein, emphasizes the need for Commission action to improve the situation and to seek to reestablish licensee individuality and responsibility as operable factors in television broadcasting.[7]

21. *"Off-network" and "feature film" restrictions in the rule.* Section 73.658(k)(3) of the rule contains restrictions on the programming which top-50 market affiliated stations may use to fill the time from which network programs are excluded: "off-network" programs or "feature films". As noted in paragraph 15 above, these were adopted along with the basic three-hour limitation, in order to preserve the "cleared" time for access by non-network sources of first run syndicated programming.[8] As originally adopted in May 1970, the restric-

[7] Chairman Burch dissented to this decision as he had to the May 1970 decision, emphasizing the likelihood of injury to these small-market affiliated stations. See 25 FCC 2d 337–8.

[8] These restrictions were not part of the original "Westinghouse proposal". In opposing petitions for reconsideration filed in June 1970, Westinghouse took the position that these restrictions are not absolutely necessary to the operation of the rule in the public interest. It suggested as possible alternative approaches either a policy statement to the effect that the Commission hopes stations will fill the "cleared" time with new material, or limiting the "off-network" restriction to only the half-hour of time which actually represents a cutback in network programming (7:30–8 p.m. E.T.).

tion ran against "off-network syndicated series programs" and "feature films previously broadcast in the market." These were both modified in the August 1970 decision on reconsideration mentioned above, to read in terms of "off-network programs" (without any exception thereto) and "feature films which within two years have been previously broadcast by a station in the market." The second change was designed to meet the arguments of some parties that it is difficult or impossible to tell, as a practical matter, whether a given feature film may have been run in the distant past by another station in the market; accordingly, the previous showing which serves as a bar is only one within the last two years. See 25 FCC 2d 334. At the same time, the effective date of these restrictions was moved back to October 1, 1972, a year after the October 1, 1971 effective date of the basic three-hour limitation on network programs in order to permit stations to use during prime time, for a year, the off-network programs and feature films already contracted for.

22. These restrictions, particularly that concerning "feature film", have been the subject of two Commission public notices since the rule went into effect, issued in April and November 1972 (FCC 72–305 and FCC 72–1032 respectively). In these, it was ruled that: (1) the "off-network" restriction applies to "special" programs run on a network though not on a regular basis, but does not apply to material which is a continuation of a network series but which itself has not been shown on a network; (2) these restrictions do not apply to independent stations; (3) the "feature film" two-year restriction does apply to the station in the market which showed the film the previous time; (4) pending consideration in the general rule-making proceeding, the Commission will not take action against licensees which construe "feature films" as including and applying to movies previously shown on a network (which may thus be shown in "cleared" prime time two years after their previous network showing, whereas, if these were regarded as "off-network" programs, they would be barred permanently from use during "cleared" prime time).

23. *Network news and public affairs programs.* Section 73.658(k)(2) of the rule, as adopted in May 1970 and affirmed in August 1970, contains an exemption for network programs which are "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events and political broadcasts by legally qualified candidates for public office." This area gave concern to some Commissioners, as to whether a broader exemption should not be adopted, to encourage presentation of this important kind of material. Since the rule became effective in October 1971, there has been in effect a waiver, sought chiefly by CBS, under which there is also an exclusion of "one-time" network news and public affairs programs, those not part of a regular series, even though they are not "on the spot coverage", etc. so as to fall under the exemption. See 32 FCC 2d 55 (October 6, 1971), 37 FCC 2d 570 (October 11, 1972), and 42 FCC 2d 615 (August 29, 1973). One of the issues in the present proceeding is what approach in this area should be adopted for the future.

24. General waiver has also been granted in another area, which was delineated in "Footnote 36" of the May 1970 decision (23 FCC 2d

395). This is where stations present a half-hour of network news in the early evening along with an hour of local news or public affairs material. It was recognized that they could comply with the rule by presenting first a half-hour of local news, then the network news before prime time (at 6:30 E.T.), and then another half-hour of local news at 7; but there seemed no reason to force stations arbitrarily to this "bracketing" format, so that they should be permitted to present the network news at 7 under these conditions, if desired, without its counting against the permissible three hours of network prime-time programming. This matter is also at issue in the present proceeding.

25. *Other developments after August 1970.* Other developments since August 1970 should be noted:

(a) *Judicial affirmance.* The rule received judicial affirmance on May 3, 1971, in *Mount Mansfield Television, Inc.* v. *FCC*, 442 F. 2d 470 (C.A. 2). Thus, the basic prime time access rule (which had not been stayed) went into effect October 1, 1971, some five months later, and the "off-network" and "feature film" restrictions went into effect October 1, 1972.

(b) *Network schedules under the rule.* As they had indicated they would, the networks cut back their prime-time programming "across the board" to three hours a night when the rule became effective in October 1971. The rule does not specify any particular hour of prime time which is to be "cleared" of network programs, but in practice it has generally been the first hour, 7–8 p.m. E.T. and P.T., 6–7 p.m. C.T. and M.T. In a letter of March 12, 1971, to the three networks, the Commission noted that they were apparently considering either 7:30–10:30 or 8–11 p.m. (E.T.) as the network portion of prime time, and expressed a preference for 8–11. This was based on what individual stations had indicated as to their plans for carrying non-network material, and also other considerations such as the impact on the Central zone from an earlier hour (7:30 E.T. would be 6:30 C.T.). In the first year under the rule—September 1971–September 1972—the networks' schedules were somewhat irregular, in light of waivers granted to NBC and ABC discussed below. Since then, the hours have been much more regular: 8–11 p.m. E.T. for all networks Monday–Saturday and, on Sunday 7:30–10:30 p.m. E.T. for all networks this year and for CBS and ABC last year (for ABC on Sunday in 1972–73 the hours were 8–11).

(c) *Waivers looking toward a "21 hours a week" standard.* In February and March 1971, the Commission granted waivers of the rule to NBC and ABC, respectively, to continue to program 3½ hours during prime time on one evening, provided the network and its affiliates cut back on another evening. See 27 FCC 2d 647 and 905. The NBC request was to continue its traditional Sunday programming including the *Disney* program at 7:30; ABC wanted to continue its strong Tuesday evening lineup. NBC cut back its programming accordingly to 2½ hours on Friday, and ABC cut back first on Wednesday and later on Monday. Commission grant was based largely on the fact that 1971–72 would be a "transitional" year under the rule anyhow, with stations free to present

off-network material during "cleared" prime time. A similar request by ABC for 1972–73 was denied in March 1972 (33 FCC 2d 1038), in view of the fact that the "transitional" period would no longer be involved, and the importance of making prime time available to non-network sources on a regular basis. Thus, while the Commission in effect adopted to some extent a "21 hours a week" instead of a "three hours a night" standard for 1971–72, it refused to do so for the future as far as network scheduling is concerned. The latter approach has generally also been taken with respect to individual stations seeking permission to exceed three hours of network material during prime time on one evening each week (using a delayed program from another night) and reduce correspondingly on another evening. However, in a few cases where special circumstances were involved, such as preemption of network material for a sports event on one or two evenings, with request to "make up" some of the network programming later, such waiver has been granted.

(d) *Other waivers.* Numerous waiver requests have been made, and usually granted, in some other areas: (1) waivers to accommodate possible sports "runovers", where the telecast as scheduled on the network should be over before prime time (e.g., a football game starting at 3:45 p.m. E.T.) but unexpected delays might cause it to run over into prime time;[9] (2) special events including evening sports events and also programs such as NBC's *Academy Awards* and *Miss America* presentations, where simultaneous broadcasting throughout the U.S. is involved and this presents problems in the West because of time-zone differences (it has been held that in these cases if the schedule complies with the rule in the Eastern and Central zones, waiver will be granted for the rest of the country; see 33 FCC 2d 743); (3) other waivers to take into account the particular problems of the Mountain time zone, where there is usually no regular network "feed" at a particular hour to be used for broadcast when received (these have been largely eliminated by our action of June 1972 re-designating 6–10 p.m. as prime time in that zone); (4) waivers of the "off-network" restrictions of the rule to permit stations to carry certain material which has previously been on the network but was independently produced and controlled, without it counting toward the permissible three hours of network and off-network material. Waiver was granted in three such cases (involving the *Wild Kingdom*, *National Geographic* and *Six Wives of Henry VIII* programs) and denied for the *Lassie* program. See 33 FCC 2d 583, 35 FCC 2d 758 and 773, and 37 FCC 2d 933. This has been one of the most controversial areas which has arisen in application of the rule.[10]

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[9] "Footnote 35" of the May 1970 decision (23 FCC 2d 395) indicated that waivers would be granted under these circumstances.

[10] Mention should also be made of the denial of waiver to ABC to present 3½ hours of Summer Olympic coverage on 10 week nights in August and September, which aroused considerable opposition. See 35 FCC 2d 340 and 765.

B. Brief description of material filed in Docket 19622

26. Forty initial comments, totalling slightly over 1,200 pages, were filed in response to the Notice of Inquiry and of Proposed Rule Making herein. By over-all number, the majority, 24, expressed opposition to the prime time access rule and urged its repeal. These included the comments of CBS and NBC (later NBC changed its position at the oral argument); five "major" film production companies (MCA, Inc., Warner Brothers and Screen Gems Division of Columbia Pictures Corp., all filing lengthy comments, and shorter comments from Twentieth Century-Fox and Paramount), ABC and CBS affiliate groups, two smaller producers or syndicators (QM Production and Wrather Corporation), comments filed jointly by Screen Actors Guild and three other Hollywood labor or professional groups, 10 comments from other station licensees (including 16 licensee interests totalling 28 stations, all of them affiliated and 17 in the top 50 markets)[11] and two from smaller Hollywood interests. Fourteen comments supported the rule, including those of ABC, the National Association of Independent Television Producers (NAITP), the Association of Independent TV Stations, Inc. (INTV), Metromedia, Inc. and Westinghouse Broadcasting Company, Inc. (both of them large multiple owners as well as TV program suppliers), three other producers or syndicators, five other station licensees (totalling 8 stations including 5 top 50-market affiliates, two affiliates in smaller markets, and one large-market independent UHF), and the American Civil Liberties Union. Two parties took no basic position as to the rule although they sought modifications of it: The Wolper Organization, Inc., a well-known producer of documentary programs,[12] and the licensee of Station WHTN–TV, Huntington, W. Va. The commenting parties are listed in Appendix B hereto.

27. Fifteen formal reply comments were filed, 12 by parties filing previously (6 proponents of the rule, 5 opponents and Wolper), and three by parties participating for the first time. The latter included comments by two producers of "documentary" material supporting the Wolper position, and joint comments from MGM and United Artists taking no basic position as to the rule but urging considerable relaxation of the "feature film" restriction.

28. At the oral argument, the parties who had filed comments early in the year took essentially the same positions as before, except for NBC (see par. 33 below). Of some 16 parties basically new at this stage, 8 supported the rule at least in its basic element, the limitation on network programing (3 licensees; Worldvision Enterprises, Inc.,

[11] Of the large multiple TV owners other than the networks filing comments herein (those with more than two stations), Westinghouse, Metromedia and General Electric Broadcasting Co. (GEBCO) supported the rule; Corinthian and Newhouse opposed it. At the oral argument, representatives of two other groups (Post-Newsweek and The Outlet Co.) and of one station owned by a third (Wometco) expressed general support for the rule, although some urged changes such as abolishing the "off-network" restriction. The term "licensee" as used in this summary counts as one licensee—two or more subsidiary companies of a common parent.

[12] Wolper urges either an exemption from the rule for network programs of "educational value" (documentaries, etc., such as those made by Wolper) independently produced, or, if the rule is repealed, adoption of a rule *requiring* the networks to present a certain amount of such material. See Section III, below.

a syndicator; Viacom International, Inc., a producer for networks and syndicator; Action for Children's Television; National Citizens Committee for Broadcasting; and Adam Young, Inc., a national representative). Seven opposed the rule: National Committee of Independent Television Producers (a newly formed group of producers who work mostly with the networks); National Conference of Motion Picture and Television Unions (along with other union groups who had previously filed); Hughes Sports Network, Inc. (suggesting as more beneficial a "forced premption" rule); Tomorrow Television, Inc., a producer for the networks and syndicator; and individuals Cleveland Amory (TV critic), Bernard Gifford (New York City-Rand Institute, though appearing for himself) and Clarence Jones, publisher of the New York City Black periodical *Amsterdam News*. One party, Robert R. Nathan Associates, Inc., took no basic position. Viacom, Worldvision and the National Committee of Independent Television Producers also filed comments in June 1973.

II. MAIN LINES OF ARGUMENT AGAINST AND FOR THE BASIC RULE AND CONCERNING THE OFF-NETWORK AND "FEATURE FILM" RESTRICTIONS

29. In the next several pages there are summarized the basic arguments against and for the basic rule, and then concerning the "off-network" and "feature film" restrictions. The arguments against and for the rule, which are often in direct conflict, are set forth in parallel columns. The arguments against are set forth first because the arguments *for* the rule are, in substantial part, responses to criticisms and charges which have been made against the rule since before its adoption; and these are better understood in light of the opposing comments filed herein, which repeat and expand the same lines of opposition to the rule.

30. In the following discussion of principal arguments, only enough factual data is set forth to indicate what the arguments really are about. More detailed factual data and specific arguments are contained in Appendices C and D to this Report and Order, referred to in the discussion below.

31. Most of the discussion is based on the 12 longer comments filed: among the opponents, CBS, NBC, CBS Affiliates, three "majors"—film producers MCA, Inc., Warner Brothers and Screen Gems Division of Columbia Pictures—and Peninsula Broadcasting Corporation (WVEC–TV, Hampton-Norfolk, Virginia); and, among the proponents of the basic rule, National Association of Independent Television Producers, Inc. (NAITP), Association of Independent Stations, Inc. (INTV), ABC, Metromedia, and Westinghouse. Shorter comments referred to herein include among the opponents the joint comments of Screen Actors Guild and three other Hollywood labor or professional groups (herein "SAG et al" or "the Guilds") mentioned particularly in connection with asserted effect of the rule on U.S. program production; and, among the proponents, GEBCO, the American Civil Liberties Union (ACLU), and (particularly as to "game shows") Goodson-Todman Productions. Not all of the parties on either side make all of the arguments mentioned; for example, among

the opponents, the "majors" urge that the rule has worked to increase, rather than diminish, network dominance, a point naturally not urged by any of the networks. However, in general, the arguments made by parties in various categories on each side are sufficiently similar so that they can be dealt with together. Reference is also made to significant oral argument material.

A. Outline of arguments against and for the rule

32.

Against	*For*
1. The rule as a "restraint" on licensee freedom in programming and on free speech and expression.	
(a) The rule is an improper restraint on licensee freedom in programing and on freedom of speech and expression, contrary to the regulatory scheme set up in the Communications Act and to the Constitution.	(a) The restraint involved is minimal (since it applies only to one hour a day on certain stations and thus does not really preclude *any* program) and is necessary to reduce inordinate network control and open up valuable time to independent sources of new material. Its propriety has been affirmed beyond argument in the *Mount Mansfield* decision; and, in any event, the present proceeding is a narrow one, to look at the operation of the rule in light of its stated objectives, and is no place for such philosophical arguments or "ponderous debate on established first principles". NAITP claims that the rule cannot be abandoned for reasons not related to its stated objectives such as philosophical arguments of this sort.
2. Whether the rule has had an adequate test at this point.	
(a) The rule has had an adequate test and there is no reason to believe that results under it in the future would be better than the poor showing so far, considering: (1) the fact that while off-network material could be used in 1971–72, in fact it filled only 22.6% of access time, so that there has been a two-year test; (2) the pattern—extensive use of game shows (often "stripped"), other network-spawned material, and	(a) The rule cannot conceivably be viewed as having had an adequate test at this point, because of (1) basic uncertainty as to whether there would be a rule at all until May 1971 (the *Mount Mansfield* decision), which left Westinghouse, Metromedia, etc. only 5 months to produce material for the first year; (2) continuing uncertainty as to the future, in view of talk of repeal by the Commission and others,

Against	*For*
foreign productions, with only a small increase in local programs—has been set, and in fact was more pronounced in 1972–73 than the previous year (less local, more game shows); (3) the alleged "uncertainty" was not really a factor; it did not deter Westinghouse and Metromedia in 1971 but their efforts were total failure; (4) the traditional station preference for "tried and true" material (plus inexpensive foreign product); (5) reliance cannot be placed on statements of producers as to their plans, since experience shows these do not materialize; (6) rather, the programing on the proponents' stations (ABC et al. using stripped game shows, etc.) shows what is to be expected.	and repeated Commission "waivers" (permitting off-network material the first year, letting ABC and NBC juggle their schedules the first year, waivers for "off-network" programs such as *Wild Kingdom*, etc.), which inhibits producers from trying expensive or "innovative" programs and stations from trying to develop new program audiences rather than short-run maximum profit from game shows and similar fare; (4) the traditional preference for the "tried and true", which can be overcome only with time (e.g., in the 1940's, the great majority of successful TV shows were adaptions of radio shows); (5) uncertainty at first, and even now, as to which part of the time would be "access time" and at what audience the producers should aim. It is claimed that, certainly, as to study of the rule's operation beyond its stated objectives—where it has worked reasonably well—this proceeding is premature.

3. The character of the access-period programming which has resulted. [13]

The character of access-period programing on the top-50-market affiliated stations is inferior to the programing previously presented, in diversity and in quality by any test-comparative production costs, audience acceptance (ratings), and critical acclaim, or lack of it. In particular:	Generally, these areas, particularly "quality", are not appropriate for Commission consideration, which makes the Commission a censor or "national program director", imposing overall national rather than locally attuned standards in a tyranny worse than the networks'.[14] The rule is not properly

[13] The term "access period" where used herein generally means that portion of prime time "cleared" of network and off-network programs in practice under the rule. As used by the major film producers in their "Joint Appendix" and later filings, it means the hours so cleared in 1972–73, which were 7–8 p.m. E.T. and P.T. (6 p.m. C.T. and M.T.) Monday through Saturday, and for ABC affiliates on Sunday; and, on Sunday for CBS and NBC affiliates, 7–7:30 and 10:30–11 p.m. This year, ABC also follows that schedule on Sunday.

[14] The argument in the text is largely that of NAITP, a narrow view of the proceeding not shared by all the proponents. ABC mentions three arguments advanced against the rule—impact on small-market stations, alleged audience decline and dearth of "quality" programs—and states that "Although these three criticisms of the Rule are worthy of serious Commission consideration . . . to whatever extent valid, they seem on the facts presented an acceptable price to achieve the objectives which the Commission found to require adoption of the rule.

Against

(a) Greatly increased use of game shows (up fourfold from 1970 to 1972, from about 8% to about 32% of access-period half-

For

chargeable with shortcomings not its fault, such as "wrong" programing decisions by the stations or the network cutback outside of the top 50 markets; and the Commission should adhere to its position, in the decision adopting the rule, that it is not designed to promote any particular type or cost-level of programing. Moreover, the rule has certainly not had an adequate test in these respects, and such inquiry improperly focuses on only one hour of the day, excluding all other time. Moreover, "quality" is a subjective matter and it would be impossible to find suitable objective standards to measure it. Cost is not appropriate; it is not closely related to quality or appeal, and this would penalize cost-effective producers in favor of less efficient entities. Audience acceptance is not suitable because, even if it showed any significant difference, this would emphasize "mass appeal" programs while penalizing the showing of programs of slightly less mass appeal but more completely meeting the needs and interests of particular groups or areas (*Hee Haw* is sighted as an example). A comparison with network programs is inappropriate, since one of the ultimate objectives of the rule is to provide different programs, and it would have to take into account numerous network failures and a spotty record in programing this difficult part of the evening, as well as the fact that the networks have been in the business for over 25 years compared to two years. More specifically:

(a) *the rule has greatly increased the amount of first-run non-network material shown in prime time;* ABC lists 58 syndi-

Against

hours on these stations; and still higher in 1973–74 as shown in Appendix C).

(b) Greatly increased use of "strip" programing, that presented 5 (or sometimes 6) nights a week, usually game shows (see Appendix C; actually, the number of "strips" is about the same as in 1970 for the 7–7:30 p.m. E.T. period, but much greater for the 7:30–8 p.m. segment).

For

cated programs in 1972 compared to 26 in 1970, and other parties list over 60 in 1972. ABC lists increases in numerous categories—drama, mystery, adventure, science fiction, comedy, cartoon, musical-variety, "personality" and children's—in addition to game shows and such programs as *Lawrence Welk* and *Hee Haw* (saved from extinction when their network runs were cancelled and now very popular), *Dr. Kildare*, *Black Beauty*, *Lassie*, *George Kirby Hour* and *Golddiggers*. It should be noted that none of the last five are still in production, though *Lassie* and perhaps others are still shown to some extent in access time. Some programs, such as *Norman Corwin Presents* and *Story Theatre*, were quite innovative even though not successful enough to continue. The increase in local programing is noted, and also programs particularly beneficial in presenting new minority-group and other talent such as *George Kirby*, or particularly relevant to American problems such as *Black Omnibus*. Westinghouse asserts that, to an increasing extent, stations are preeempting other prime time (network programs) to present such material. Documentaries, rejected by networks, have gained exposure.

(b) "*Game Shows*", like all types of material, some are good and some not so good, but overall they are popular and a legitimate form of programing featuring "real" people and stories and as entitled to exposure and access as any other kind of programing. Moreover, they were a feature of network prime time schedules in the 1960's (*Let's Make a Deal* on ABC as late as the end of 1970) and still are extensively stripped on the networks in the daytime.

Against

(c) *Nearly all U.S. material is "network derived"*, either continuations of U.S. network series such as *Lawrence Welk* and *Hee Haw* or game shows such as *To Tell the Truth*, or "sixth episodes" of current stripped network daytime game shows such as *Hollywood Squares*, or material more generally derived from former network shows.

(d) *Greatly increased use of foreign-produced materials*, for example 75% of access-period dramatic programs (in terms of time devoted to them in 1972) were produced abroad, compared to virtually none in 1970. This percentage is even higher in 1973, with the demise of the U.S. *Dr. Kildare* program. Usually these shows are "off-foreign network", and can be sold here cheaply.

(e) *Less diversity through a larger amount of time being devoted to a smaller number of programs.* In 1970, the 23 network shows, wholly or partly during the access period, took 74% of entertainment time, whereas in 1972 the 25 top syndicated programs took more than 86%, five of them over 40%.

(f) *The small amount of local programming which has resulted from the rule.* While locally produced access-period programming has increased threefold (from 44 half-hours in 1970 to 135 in 1972, and 145 this year) it still is small in amount, less than one half-hour per station (some markets have none) and less than the time devoted to either one of the top two stripped game shows.

(g) *The lack of relevance of access-period syndicated programing*, which—largely game shows and foreign product—does not

For

(c) "*Stripping*", to perhaps an excessive extent, is something which will pass with time; anyhow, the Commission can move against the practice as such if it believes it undesirable (by rule or close examination at renewal time).

(d) "*Network quality*" which is being compared is not always so high, as shown by critical reactions, numerous failures (all 7 of one network's new shows in 1971 failed to return in 1972), and some less than glorious material used by networks in recent years in this demographically mixed and difficult time-segment.

(e) *The opponents use the term "network-derived"* so broadly as to be meaningless, since this is characteristic of all programing (*All in the Family* spawned *Maude*, etc.). Rather the public interest is served by enabling *Lawrence Welk* and *Hee Haw* to continue even though no longer consistent with the networks' plans and ideas.

(f) *It is ridiculous to claim greater "relevance"* on the basis of network-program characters such as a domestic in *Maude:* rather, the greater relevance is in programs presenting new minority-group talent (*Kirby*), especially concerning minority problems (*Black Omnibus*), or local material concerning such problems and employing minority-group members as hosts and talent.

(g) *Use of foreign material* is justified as an "early weapon" against the entrenched networks; in any event, the networks have

Against	*For*
deal to a substantial extent with current American life and problems, and does not employ minority-group talent to anything like the extent of current network productions. According to producer Bud Yorkin, network programming is the best way to approach minority-group situations and problems, citing the extent of Black participation and interest in his *Sanford and Son* program.	done so also (Metromedia lists 16 network series in the recent past—*The Saint*, *Tom Jones*, etc.) plus perhaps 30% of the ⅓ of network prime time devoted to movies.
(h) *Commission inquiry into the nature of programing in general terms is appropriate*, just as in renewal applications where program type classifications are used.	(h) If *overall prime time* is looked at, the programing picture is much more diverse, for example drama has increased overall in 1972 as compared to 1970.
(i) *Extensive use in small markets of "off-network" stripped material* instead of former network programs.	(i) One reason for the limited kinds of U.S.-produced material is that in general it must fit a half-hour segment. If a full hour were available, there would be more drama and similar material.
(j) *The rule has prevented the network exhibition of much valuable material*, including programs of value for minority groups. Of 217 pilots produced in 1972–73 and 1973–74—offered to the networks—only 33 became regular series and 24 received partial exposure; 160 were shutout entirely. Network regular public affairs and "news documentary" programs have largely dropped from prime time.	
4. Level of commercial activity and benefit to non-national advertisers.	
(a) With 4 to 6 minutes of commercials in syndicated programs as compared to 3 minutes in network programs (and a longer station break), the rule leads to over-commercialization, with the level of commercial activity up as much as 66%, in addition to numerous product "plugs" in game shows. While this may have resulted in increased opportunity for local and other non-national ad-	(a) The rule has significantly increased opportunities for local and other non-national advertisers by giving them access to valuable time for their messages even though they do not need, or cannot afford, the expensive network system, a source of concern to Government agencies and Congressional Committees in the past. The benefit accrues both to local advertisers getting spots in

Against	*For*
vertisers, it has been at the expense of turning the access period into a "commercial quagmire".	syndicated and locally produced programs, and to smaller national advertisers (e.g., a furniture company) who can choose programs suited to their needs and sponsor them in selected markets. Also, while syndicated programs may contain more commercials, this is governed by codes of practice, and some licensees (e.g., Westinghouse) have not raised their commercial level. While national advertising in prime time was up 23% in 1972 compared to 1970, local advertising was up 38%.
5. Effect on "independent production" [15]	
(a) While the rule was designed to diversify the sources of prime time programs, it has had the opposite effect, with 43 producers represented in the access period in 1972 (syndicated programs) compared to 54 in 1970 (total of syndicated, off-network and network programs), and an even greater decline if only U.S. producers are counted. There have been no new entrants, virtually all of the present producers having been on television before and often with prime time material (including network "specials" and in some cases regular network series). There has been a benefit chiefly to a few game-show specialists and importers of foreign product.	(a) The rule has had a sharp impetus on independent production for prime time, with some new entities, producers formerly working chiefly for the networks who are now in independent production, and other independents expanding their activities—developments which will increase with time and the certainty of the rule's continuance. ABC puts the number of first-run syndicated producers in prime time in 1972 at 43, compared to 21 in 1970. The same opportunity is there for the "majors" and others if they choose to enter the field. Producers are also benefitted by having much more freedom to display creativity in ideas and production, rather than having to conform to the ideas and supervision of 3 network program executives. Local programing and advertiser-developed programs are also said to represent healthy development of sources independent of the networks.
(b) Moreover, other equally "independent" producers in the	

[15] The term "independent producer" has never been precisely defined; one suggestion is that it should mean any producer when he is producing for non-network distribution, but not when he is producing for network use.

Against	*For*
sense that they are not associated with networks (including the "majors", Tandem Productions, QM, etc.) have been seriously hurt by being foreclosed from access to a substantial portion of prime time, since they rely on the network process for obtaining exposure for their quality product. It is claimed that the non-network producers have sought and secured not the "right to compete" but freedom from legitimate competition.	
6. Effect on U.S. program production; "impact on Hollywood" (see Appendix D for detailed facts and arguments).	
(a) By eliminating 12 hours (24 half-hours) of network-programmed prime time each week, the rule has had a very serious impact on U.S. program production activity (particularly in Hollywood) and employment in it. The gross loss is computed to be in the order of $60 million total, or about $53 million annually in payroll for talent, technicians, etc. (24 half-hour program slots, times 24 original episodes each year on the average, times $100 thousand per episode) representing 16,000 production jobs. This loss is made up only in small part by syndicated program production because of its nature, game shows, foreign product, etc., and not by local activity in most cases, so that overall there is a loss of $25 million to $30 million. Unemployment rates in Hollywood are extremely high, 85% for Screen Actors Guild members and over 50% for some technician unions, as a result of this and other problems, endangering the "pool" of talent and skilled technicians necessary for a developing industry. Most other countries recognize the need to protect their TV industries, by quotas, subsidies, etc.; here, the	(a) This argument is not relevant; it is not up to the TV industry or the Commission to guarantee the welfare of Hollywood (the Department of Justice indicated a similar view in its filing in one of our proceedings).

Against

U.S. is doing just the reverse by encouraging foreign competition, contrary to the national interest. The loss has required shelving numerous network programing projects which would have been of value to minorities and would have employed minority-group talent and technicians; the same is true with respect to situation comedies which are of interest to, and employ, women. The quality of access-period programs which have resulted is extremely poor (see above), and a few local successes should not obscure this. In sum, the decline in employment represents a decline in production values and therefore in program quality for the U.S. audience, contrary to the public interest and the national interest.

For

(b) This argument is essentially a myth, if employment all over the U.S., and not just in Hollywood, is considered, for example, the 14 people added to the staff of ABC's Chicago station to handle its expanded early evening news program. In general, there is bound to be more employment from more than 60 syndicated programs shown in the access period, combined with local increases, than in 23 network shows, particularly since the former have as good, or often a better, "new-repeat" ratio. While there doubtless are, and will be, "shifts" in employment, for example access-period variety shows employing musicians compared to "network-type" shows employing actors, and with respect to various parts of the country, overall there should be a gain rather than a loss.

(c) The analysis by the unions and "majors" ignores certain realities, such as the shift from film to tape production (which means

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	AFTRA rather than SAG members as actors) and the rising amount of income derived from producing TV commercials.
	(d) Conditions in Hollywood are improving — unemployment was less in 1972 than in 1971, the "majors" showed, in most cases, better profit pictures, the number of Hollywood movie "starts" was up and foreign "runaway production" starts were down, and movie box-office receipts increased.
	(e) To the extent that there is a problem, it is a complex one resulting from a number of factors, several of them resulting from extremely high production costs and obsolescent business practices (which some of the majors have acted recently to eliminate). ABC mentions padded costs and "featherbedding". Some of the particular factors are increased TV re-runs, increased network prime-time use of made-for-theatre movies, "runaway production" and declining box office receipts ever since the 1940's.
7. Effect on "Network control and dominance".	
(a) As to the objective of lessening network dominance, the rule has been definitely counter-productive, increasing this rather than lessening it. This is because the rule creates an artificial scarcity of network prime time by reducing it one-seventh (3½ to 3 hours a night), and thus increases the network "lock" on the remaining three hours. Thus, since the three networks are in a dominant position both as sellers of advertising time (vis-a-vis several hundred potential national advertisers) and as buyers of programing (vis-a-vis more than a hundred producers), their control in both markets is increased. They are able to raise	(a) "Network control" is obviously reduced by removing an hour of prime per night on 150 stations from the "network funnel" through which prime-time material would otherwise have to pass. As a result, the number of buyers of prime-time material has increased from 3 to 150, and, often for the first time, stations are making individual decisions as to prime time programing, as envisaged by the Communications Act. Having alternative potential buyers, producers are freed from network control, and from having to limit their ideas and conform the execution of these ideas, to what suits the plans and views of

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prices to advertisers considerably (the average price per prime commercial minute went from $50 thousand to $60 thousand in 2½ years) and at the same time make little or no increases in the prices they pay producers for programs. Moreover, they are increasing their dominance of other time, such as weekend late afternoons for sports and NBC's late late show, and, out of a sense of loyalty, affiliates have cut down their preemptions of network prime time programs.

(b) The network companies' control over programing is also exercised through their owned station purchases of access-period material. Since all network outlets in the top 3 markets are network-owned, each network also has two other stations in major markets so that overall it reaches about 23% of the U.S. through its owned stations, and the five stations usually buy syndicated material as a group, this means that it is highly important, if not indispensable, for a program supplier to make a deal with one of the network groups in order to have an economically viable product. Thus, "network control" is very important even as to non-network material.

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network program executives at the time.

(b) "Network dominance" is still a serious problem, as indicated, for example, by the extent to which the amount of station time devoted to network programs has increased over the last 20 years (in the case of NBC, from about 44% of the typical broadcast day to about 74%), the extent to which it continues to increase as the networks expand their programing in other parts of the day, and circumstances such as the election campaign of 1972, when the networks were able to, on a number of occasions, clear time on affiliates during the "access period" for political broadcasts, rather than preempting their own programs during network prime time. The rule, in short, is only a small weapon in the struggle against this tendency, but at least it is something, and should clearly remain as long as the problem exists.

(c) Moreover, without the rule there would be increase in another kind of dominance, that of the "major" film production companies, who among them have more than 50% of network prime-time non-sports entertainment time in 1973–74, with MCA by itself having some 20%. The access period should remain clear from

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	the programing of this limited number of sources.
8. "Audience acceptance" (ratings) (7:30–8:00).	
(a) Audience ratings for the access period (7:30–8:00) were considerably less in 1971–72 than they were in earlier years when network programs were shown then. While this was not true in 1972–73 (when ratings were overall back to their earlier levels or slightly higher), it was still true in a few markets and, moreover, there was generally a shift in audience from network outlets to independent stations, harming the former. This shift results from the fact that the independents may, and do, present off-network material during this period, and this shows the basic inferiority of new access-period material, less attractive to audiences than either network or off-network programing.	(a) After dropping for the 1971–72 year, ratings during the access period have returned to their previous levels, or even higher. ABC refers also to an "audience preference survey" (TV–Q) which shows only slight differences between access shows and following network programs.
9. Effect on stations.	
(a) All affiliated stations are harmed through the degradation in quality of the programing they are able to offer. This is particularly true of small-market stations, whose limited economic base does not enable them to generate enough advertising revenue to afford programing of reasonably good quality to replace the network programs lost.	(a) While impact on small-market stations (and others) was one of the strongest arguments against the rule in 1970, this has simply not materialized. Only one station (KROC–TV, Rochester, Minn.) specifically claimed economic hardship in its comments, and this was much too vague to meet the Notice's requirements in this respect so as to be probative. Affiliates in large markets, down to about the 75th, are better off under the rule, since they can keep all of their access-period revenues.
(b) As to economic consequences, affiliates in the large markets are making more money through getting all, rather than 30%, of the revenues from the access period; but these stations have always been quite profitable and do not need help. Medium-market	(b) *Independent stations* are greatly benefitted, both from the impetus to the production of more non-network material which they can use, and, of more immediate consequence, the fact that during these hours they may present popular off-network material

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stations are not affected either way, and smaller-market stations—both those in the lower portion of the top 50, and those outside—are seriously harmed, since they are not highly profitable in any event and must pay the cost of programing the time themselves, with limited revenue return if any. Also, some stations have been hurt economically through not being able to make full use of costly feature film packages they have purchased.	which their competitors cannot, giving them an audience advantage. This is highly important, such stations now getting as much as 40% of their revenues from the 6–8 p.m. hour (and are able to use spots in the access period to sell other time in "packages"). Ratings have increased by 100% or often more. This is important to the survival and viability of some of these stations, and enables independents to engage in more extensive local efforts (including news and public affairs) and to buy desirable first-run syndicated material for other times.
10. Effect on the networks.	
	(a) The networks had more net income in 1972, under the rule, than ever before, and should not be heard to complain against the rule. ABC and the cause of "internetwork competition" have particularly benefitted, with ABC having achieved approximate parity with the other two networks and in 1972 showing its first profit on network operations in 10 years. The reduction in network prime time, and the cost of programing it, came at a good moment, since in 1971 cigarette advertising was banned for the first time, and generally "soft" economic conditions prevailed.
11. Effect of repeal.	
	(a) Repeal of the rule would have a disastrous effect, both on individual independent producers who have made personal financial commitments to its success and continuation, and on the public interest. Repeal would cause some producers to cutback their operations by 50%, others to withdraw entirely, and would break the back of independent production for years to come, depriving the public, perhaps permanently, of the

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	one real opportunity to receive fresh, imaginative programing. It would be worse than no rule at all, tending to establish a Commission view that the network way is the only way. It is inconceivable that repeal at such an early date should be considered seriously, when the rule was adopted after years of study and is clearly in furtherance of the antitrust tradition, and without the "safe period" on which independent producers and syndicators were entitled to rely.
12. The "barter" distribution system.	
(a) The "barter" system widely used with syndicated access period programing—under which a national advertiser acquires a series or secures its production, and offers it to stations in return for part of the commercial positions in the program (no other payment)—presents some problems and should not be encouraged. First, stations are often required to take the program in advance of production, without knowing much about it. Second, cancellation is difficult, because of problems of "making good", to the sponsor, the commercials in the remaining programs. Third, there are anti-competitive aspects—these sponsors are often large national spot advertisers, and "tie" the purchase of spots on a station to station acceptance of the program.	
13. Whether the networks "control" producers or their programs.	
(a) No (producers Bud Yorkin and Lee Rich). The networks do not control what the independent producer, doing business with them, produces or how he produces it. Rather, the networks are simply one conduit by which the producer can gain exposure for his product	(a) Definitely yes, both as to basic program ideas which they will and will not accept, and in the production of a program, for example, ordering a scene of an episode to be shot and re-shot until they are satisfied (which adds to the costs; whether it adds

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on the nation's TV screens, first-run syndication being the other; and producers who choose the network route because of its advantages (cheaper and easier access) should not be barred from competition.	to "production values" is a matter of individual judgment).

14. Whether network or syndicated programing is more likely to be "new" or "innovative".

(a) Definitely network programing (producer Lee Rich) because only the networks have the fortitude, or resources, to start and continue a new type of program which is not immediately successful in gaining audience, advertisers and clearances, although later it may be a tremendous success (*All in the Family*, somewhat controversial at first, and *The Waltons*, a "gentle" show without violence, are cited as examples).	(a) Independent producers, who are freed from the need to tailor their ideas to obtain acceptance from one of three networks, and from control over the production process. Moreover, "independent" producers do not have the tremendous competitive stakes and investments which the networks do, and therefore are more free to experiment even though they may not always be successful.

15. Whether the rule can result in programing of network-comparable quality and diversity (see Appendix D for more detailed facts and arguments).

(a) No, because of the inherent advantages of the network system; what the Commission has tried to do is to achieve the impossible, having programing like that of the networks without using the network system. Dramatic program production is a very risky and high-cost business, with costs in the order of $100,000 per half-hour episode and $200,000 per hour episode, and several hundred thousand for a pilot, with only a small proportion of pilots becoming successful series. This is difficult with the network distribution process, and impossible without it (it was possible years ago, with much lower costs and before the networks had complete national inter-connected coverage, but those days are long gone). Essentially, there are three problems: (1) the "fractionated mar-	Definitely yes, because: (a) Costs of production are less for first-run syndication than for network programing. Talent will work for less (e.g., the *Hee Haw* performers when that show went independent), producers are free to "shop around" for facilities at cheaper prices rather than use those of the networks at high prices (as producers for the networks are pressured to do), and the production need not be saddled with the high "overhead" characteristic of network and major-studio productions.

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ket", with many more syndicated programs than there are available slots on top-50-market affiliates; (2) the uncertainty; even if a program may ultimately be sold in nearly all the large markets, this will not be known in advance so the producer will know how much he can spend;

(3) the inherently higher costs of syndicated distribution anyhow, with a "syndication fee" in the order of 30–35%, or the need for multiple sales efforts, and the cost of making and shipping multiple prints (said to be as much as $5,000 per program).

(b) It is also claimed that the syndication market cannot possibly produce revenues approaching $100,000 per episode; one estimate is that the syndication process could produce a gross of no more than $58,000, or a net after commissions, etc. of $45,000, for two runs of a program. (However, see the proponents' data as to sums actually gained).

(c) Aside from the facts as to what *might* be possible, there is also the matter of what is likely to happen. Since a first-run syndicated program such as a "network-quality" dramatic program is going to be expensive to produce, it will have to be priced rather high, and stations are not likely to want to pay that kind of money when they have obviously cheaper alternatives: (1) game shows, which cost $10,000 or less to produce, and many of which have a proven "track record" of audience appeal; or (2) foreign material, including dramatic shows, which can be sold cheaply in this country when it is "off-foreign network" and most or all of the production costs have already been recovered.

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(b) Costs of distribution are considerably less than claimed by the opponents; for example, while Metromedia would charge a fee of 35% or so for syndicating someone else's production, it figures distribution costs on its own material (*Primus* and *Dusty's Trail*) at only about 10%, including the cost of some five salesmen.

(c) Syndicated programs draw more revenue than that claimed by the opponents; for example, Metromedia's *Primus* took in $63,000 per episode domestically and about $20,000 in overseas sales, even though it was a failure rating-wise (this resulted in a slight profit over production cost of $75,000), and the mid-1973 figures for its new *Dusty's Trail* program are about the same. *Let's Make a Deal* will have grossed $80,000 per episode.

(d) It is expected that stations will be willing to pay more than

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	they do now for access-period material (estimated at often a sum equal to three 30-second spots),[16] when the rule is given assurance for the future and the idea of quality access-period material becomes established.
	(e) Independent producers for syndication do not expect to make a profit, or even break even the first year, on a program series, any more than producers for networks do on the network run. Rather, the hope is for the program to be successful, so that it continues in production and exhibition for four years, and the entire package of 104 or so episodes can then be sold on a "strip" basis. This is the big "killing" for the producer, which he hopes for whether it is a network or first-run syndicated program initially.
	(f) Access period showing on stations subject to the rule is not the only source of revenue to producers; many programs are also used by additional stations in non-prime time, and by stations in other markets.
16. Performance in light of the Commission's stated objectives.	
(a) The rule has been a failure in terms of the Commission's objectives in adopting it. Network control and dominance has been increased rather than lessened, there are virtually no new sources of programs (and fewer producers in the access period than were there before) and the resulting programing lacks both diversity and quality.	(a) The rule has worked at least reasonably well in terms of the Commission's objectives. An important amount of valuable time has been freed from the network "funnel", there are many more producers of first-run syndicated prime-time programing than previously, and more such programs, including material of diversity and quality. Competitive conditions for producers are much improved with 150 instead of 3 customers for their product.

[16] The total of the 30-second national spot rates in typical access-period programs for one station in each of the top 50 markets is just about $25,000. Assuming that eight 30-second spots are sold in each half-hour at the straight national rate without discounts, that each episode is used twice during a year, and that the program is sold in 40 of the 50 markets, representative as to size, the total per program revenue which a half-hour series would generate for the 40 stations would be $320,000 gross, or $272,000 after 15% agency commission.

17. Benefits and detriments.

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(a) The rule has harmed most of the components of the industry—producers who seek to use the network route (the "majors" and many other producers); talent, technicians and their unions from the loss of activity in production of quality network programs; affiliated stations with respect to the quality and diversity of programing they are able to present and, in the smaller markets, economically as well; and the public through loss of good and diverse material during these hours.	(a) The rule has benefitted, or will benefit, most groups in the industry—independent producers, probably, at least ultimately, talent and technicians through a greater number of prime time programs, affiliates in the majority of markets (without any significant harm to those in smaller markets), independent stations, the networks, and the public through getting a chance to see new and innovative material.

33. *NBC's position.* Of the three networks, ABC has vigorously supported the rule, and CBS has opposed it (although in the final oral-argument stage its arguments were largely philosophical and it specifically asked that repeal not be effective until September 1975). NBC, originally and through early 1973 one of the most vigorous opponents of the rule, changed its position at the oral argument, and in a sense supported it. Its position was in substance that it had doubts about whether the rule was originally a good thing, but it was adopted, and extensive changes in the industry have resulted. It is questionable whether the *status quo* could really be restored in light of these changes; therefore the rule might as well be retained (with some adjustments of a fairly mechanical nature) and the controversy thus finally ended.

B. "Off-network" and "feature film" restrictions

34. As mentioned in par. 21, above, Section 73.658(k)(3), as adopted in May and modified in August 1970, provides that the time cleared of network programs may not be filled with "off-network programs; or feature film which within 2 years prior to the date of broadcast have been previously broadcast by a station in the market." In practice, these restrictions and their application have been among the most troublesome areas of the rule, and the Notice beginning this proceeding proposed for consideration a number of modifications (see Notice, pars. 37–44.[17] With respect to the "off-network" provision generally, the proposals were mostly in the direction of liberalization; as to use of "feature film", proposals in both directions, toward a more

[17] As to the "off-network" restriction, modification along four possible lines was proposed, in addition to continued *ad hoc* consideration but on a more orderly basis. The four (Notice, par. 37) were: (1) exemption for "short series", e.g., 6 or fewer episodes; (2) exempting packages consisting very largely of new material but with a few off-network episodes (e.g., Christmastime "specials" of certain series); (3) providing that stations may present, either without limitation or up to a certain number of hours a year, off-network material which has not been on the network for some time (e.g., 5 years for the material itself and 2 years for the series); (4) the "MCA proposal", under which a series could be presented if it consisted of about 25% new material (an extension of the waiver granted to *Wild Kingdom*).

liberal and a tighter rule, were put forward. A number of parties, on both sides of the basic question, commented on these matters. Their arguments are discussed at this point, since they are for the most part general in nature concerning some of the basic ideas involved, rather than the details of particular modifications.

35. *General arguments in favor of the restrictions.* Some of the proponents of the rule—including NAITP, INTV, Metromedia and Westinghouse—[18] argue vigorously in favor of these restrictions and against any relaxation of them by waiver or over-all liberalization. Among the arguments advanced are:

(a) Relaxation is unnecessary because *the rule does not preclude the broadcast of any program.* A given off-network program may be shown outside of prime time or, by preemption, during the network portion of prime time; it may be shown at any time on independent stations (in 36 of the top 50 markets) and, of course, without any restriction outside of the top 50 markets. NAITP also suggests a way it can be presented by top 50 market affiliates during the access period: in the spring and summer, when the stations may run it and comply with the rule by substituting a first-run syndicated series for a network program, which by then will be all re-runs anyhow.

(b) The vital importance of the rule in *stimulating the independent production of new material*, and the harm to that objective which results from relaxation of the rule, in two ways: first, the impact on the amount of access-period time actually available to new material; and second, the uncertainty or potential harm to independent producers of material similar to that for which the rule is relaxed. It is said that development under the rule requires *stability*, not the possibility of relaxation which makes it a "floating crap game" or a "house of cards" likely to tumble around the ears of producers entering it.

(c) *The additional importance of the rule in minimizing network control* which would result from widespread use of former network material which had its origin in a system of high network dominance. This point is urged by NAITP but not much by other parties.

(d) Waivers of the "off-network restriction"—and general relaxation also, if it involves concepts such as "fact v. fiction", "educational value", etc.—*involve subjective Commission quality judgments and are therefore inadmissible*, as well as essentially irrelevant to the rule's objectives, which were concerned with a program's origin, not its nature.[19] Metromedia asserts that the Commission's desire to permit the free presentation of off-network material "a cut above the average" is understandable; but it must resist the temptation in the interest of achieving the rule's objectives. NAITP asserts that this impermissible "quality" test is implicit even if not expressed, for example the "cost" of all-new production of the *Wild Kingdom* series, mentioned in the

[18] ABC also opposes repeal or wholesale relaxation of the rule at this time, though it may be possible in the future, when new first-run syndicated material has become better established. It agrees with the other parties mentioned concerning the specific proposed modifications. GEBCO does not oppose relaxation of the rule in this respect.

[19] NAITP: "And quality of access shows is not a proper criterion for anything at all since the subject is one to be avoided. . . . "Moreover, PTAR has nothing at all to do with what the affected programs are but only with how they were produced. Thus, since their nature has nothing to do with their original exclusion, there is no way in the world that their nature can be reason for lifting that exclusion."

decision granting waiver, reflects essentially a Commission view that the program is too good to be lost. This is wrong, in view of the amount and variety of new material available. If a program is really so good, and the Commission believes this kind of evaluation is appropriate, NAITP asserts that the Commission should "bite the bullet" and make the networks run the material again.

(e) *The various proposed "off-network" modifications (footnote 17, above) are all bad*, in that they are unnecessary ((a) above) and would have an impact on prime-time availability. As to the possible "short series" exemption, it is said that there is no public-interest basis for distinguishing between these and longer series, that the Commission's judgment here too is probably a "qualitative" one, and that waiver for even one of these series, and certainly for more than one, would have a substantial impact on access time availability to new material. The proposal involving broadcast at a certain length of time after the program ran on the network is said simply to exclude current network shows to permit the showing of *old* network shows. The "MCA proposal" is more vigorously opposed, as being extremely harmful to sources of new material, and redounding only to the benefit of a few parties, such as the "majors", who have off-network packages. It is claimed that this would be highly damaging and unfair competition, in that such material could be offered at much less than an all-new package with its high production costs, has an established "track-record" which helps it competitively also, and represents an almost risk-free operation since the supplier (having most of the package in hand already) does not even have to start new production until success is assured.

(f) Relaxation or repeal of the "off-network" restriction *would hurt the cause of program diversity* (by making old material more widely useable) and decrease the total pool of programming by discouraging the production of new material—in favor of material which is "neither new nor independent". Unemployment would thus be increased. NAITP claims that the prime-time rule without the "off-network" and "feature film" restrictions would be worse than no rule at all, for these reasons. It is also claimed that there would be no programming aimed particularly at specialized audience groups, since this is one of the chief absences in network programming and thus in off-network material.

(g) *Independent stations will be hurt* through not having the exclusive right to show off-network material in access time, as well as losing the other benefits of the rule through an increased supply of new material.

(h) There would be less of a process of *educating audiences* and stations to enjoy and use new first-run syndicated material.

(i) The rule would benefit only a few, at the expense of all other groups—independent producers, independent stations and the public—for reasons mentioned above.

(j) Waiver or relaxation would simply breed more similar requests. However, it is urged that any relaxation should be codified rather than *ad hoc*, so that parties involved can plan their activities.

36. *General arguments against the "off-network" and "feature film" restrictions.* The continuation of these restrictions, at least in anything like their present form, was opposed by a number of parties, including those opposed to the basic rule—CBS and NBC, the "majors", the CBS and ABC affiliate groups, etc. (sometimes opposing these even more strongly than the basic rule)—and some individual licensees who support the basic rule restricting network programming but opposing these additional limitations. These included the licensees of Boston and Wilkes-Barre-Scranton affiliates and of two stations outside the top 50 markets (both in Iowa). Much of the argument is along the same general lines already indicated, including: (1) the assertedly dismal quantity and diversity of the access-period material which has developed, and its lack of real "newness", which makes it ridiculous to deprive stations and the public of much more attractive off-network material; (2) the restriction on licensee freedom of choice, said to be in violation of the Constitution and the Communications Act, particularly since there is here no relation to reduction of "network control"; (3) the assertedly subjective and impermissible "quality judgments" which the Commission has had to make in applying the rule. The latter line of argument is basically the same as that of proponents of the rule; but these parties, such as CBS Affiliates, reach the opposite result: since the waiver process is impermissible, and since a "no-waiver" policy which would bar fine off-network material would be even worse, the only solution is to get rid of this restriction (even if not the basic rule).

37. The essence of the opponents' case is set forth in the comments of Boston Broadcasters, Inc., as follows:

> The principal objections to the prime time access rule have not been its limitation upon network offerings, but its attempt to regulate the content of the access period by proscribing off-network and feature film material from that period. These proscriptions were justified at the time of their adoption as useful means of encouraging independent syndicators to come forward with new programs. Measured by its achievements, this aspect of the rule has been a failure. This failure should be acknowledged as soon as possible, and the proscription removed. So long as the networks are precluded from direct or indirect control over access programming, the principal purpose of the rule will have been achieved, and marketplace forces should result in the best mix of quality and independent production.

38. Some other points urged are:

(a) WBRE–TV, Wilkes-Barre-Scranton, stating that stations are limited by the lack of good-quality access-period material and their reluctance to accept "barter" programming, asserts that stations in its market are handicapped in competing with the many independent stations carried in their area by CATV, which can present the popular off-network material.

(b) With the lack of good-quality material, some stations are forced to run movies, which present scheduling and other problems (WVEC–TV, Hampton-Norfolk).

(c) These restrictions discriminate against and harm certain independent producers—chiefly the "majors"—in favor of others (e.g., game-show and foreign-program suppliers). It is claimed that the "majors", and others producing for network use, often do not recover

costs from their network sales, and must look to the "after market"—much curtailed by these limitations—to be successful.

(d) Elimination of the "off-network" restriction would not have a serious impact on the rule's objectives, in view of the rather small amount of off-network material used in 1971 when it was permitted (the 22% figure cited above), less than the amount of time devoted to game shows.

(e) Westinghouse's statement in mid-1970, in opposing petitions for reconsideration of the rule, that the off-network restriction is "not absolutely essential" to its success.

(f) The licensee of the two Iowa stations urges that top 50-market affiliates should be able to use off-network programs so as to spread the cost of such programs, which now falls largely on smaller-market stations.

39. As noted above, one of the proposed modifications of the rule is the "MCA proposal", under which a package of off-network plus 25% new material could be shown without restriction in the access period. MCA no longer advances this, stating that it was advanced as an interim measure, to get relief for the 1972–73 season, and that, instead, the rule should be repealed entirely (or at least the off-network part of it).[20] On the other hand, CBS Affiliates and some other parties claim that this relaxation would be a good thing in the absence of complete repeal—the minimum the Commission must do to avoid complete absurdity. It is also claimed that this would not necessarily have a severe impact, since many older off-network series are out of production by now.

40. We also note a proposal advanced by the licensee of Station WHTN–TV, Charleston-Huntington, West Virginia, to the effect that the "off-network" restriction should be of only two years duration, similar to the "feature film" limitation now in the rule. It is claimed that this is to be preferred because there is little new material of good quality.

41. *The "feature film" restriction.* The general arguments above of course apply as well to the "feature film" restriction in Section 63.658 (k) (3); but this subject also presents some particular aspects.

42. The August 1970 modification of the rules provides that stations may not fill the access period with "feature films" previously shown by a station in the market within the last two years. This, combined with the general "off-network" restriction in the same paragraph, appeared to some to create ambiguity as to whether a movie which previously ran on a network (either one made for television or one made originally for theatre use) is "off-network", permanently barred from the access period, or a "feature film" barred only for two years. In a Public Notice of November 1972, we took cognizance of this possible ambiguity and stated that, pending this overall reevaluation of the rule, stations subject to the rule may construe it to bar such "off-network" movies only for two years from their previous showing.

[20] MCA suggests that some of the problems raised by the "off-network" restriction could be met by tightening the rule, to bar to the same extent material which is technically "new" but simply is a continuation of network material, and also material which is "off-foreign network". However, it states that this is really not practicable; there simply would be virtually no suitable programing left.

43. Aside from the semantic problem of what is a "feature film", the discussion of this subject in the Notice (pars. 41–44) and comments raises essentially the following issues:

(a) Whether there should be any distinction in the rule among three categories of movies or "feature films" [21]—those made for theatre and distributed for TV only in syndication, those made for theatre originally but later shown on a network, and those "made for television" (which, at least up to now, means "made for network television").

(b) To the extent that the rule is to be based on a certain period after the previous network or non-network showing in the market, should the period of restriction be less than in the present rule (e.g., one year), or more (e.g., 5 years), or longer, or even permanent, with respect to reuse by the same station (which normally would have little difficulty in determining whether a film had been shown on it in the past)?

(c) With respect to any or all of the above categories, should there be no restriction at all, or, on the other hand (as urged by NAITP) a total ban on using previously shown movies during the access period (the original May 1970 provision) or even (as claimed by NAITP to be the most consistent with the rule's objectives, but not actually advanced as a proposal) a total ban on any use of movies during the access period, since they are not new material created for this TV use?

44. The proponents of tight restrictions in this area are the same as those mentioned above, particularly NAITP, INTV, Metromedia and Westinghouse, NAITP taking the firmest line.[22] These parties claim generally that an off-network program is just that, whether it is a movie or something else, and should be barred from the access-period if the rule is to fulfill its objective of providing opportunity for sources of first-run material (syndicated or local). NAITP also makes the argument noted above concerning the importance of barring from access time material which has reflected network control; while it concedes that this is less applicable to "made for theatre" features, it asserts that they should be treated the same because of the inhibiting effect on the development of new material. NAITP, alone among these parties, asserts that even as to "made for theatre" features never shown on networks, the rule should impose a permanent ban against reuse in the market during the access period, the same as that originally adopted in May 1970 (the other parties mentioned apparently are reasonably well satisfied with the present two-year limitation as long as all movies shown on networks are permanently barred).[23]

45. In support of its position that the ban on re-use of any movies should be a permanent one, NAITP asserts that the two-year restric-

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[21] In the joint reply comments of MGM and United Artists, it is pointed out that the term "feature film" has been judicially defined so as to limit it to "made for theatre" material, *U.S.* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 157 (S.D.N.Y. 1960).

[22] ABC's position is that the present rule, with the liberal interpretation adopted in the November Public Notice, is satisfactory; anything is a compromise, and this is probably as good as any other. It is urged that there is no basis for distinguishing among the three types of features, that this material is popular and of high public interest, and that there should be no further restrictions.

[23] NAITP in fact suggests that the objectives of the rule would be best served by a total ban on access-period use of movies, at least until some "made for syndication" are produced, since they do not represent new material created for the access period. However, it does not actually advance this suggestion.

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tion is illogical and inconsistent with the purpose of the rule; that it encourages stations to re-run older movies rather than newer ones, and to preempt network movies for their own because they can re-use the latter but not the former; and that if stations really have a question about whether a movie has been shown in the market in the distant past—the chief reason for modifying the permanent bar to a two-year restriction—they can simply play new movies instead. In short, all movies previously shown on TV in the market, regardless of origin and of whether they were shown locally or on a network, should be forever barred from "cleared" prime time, at least unless the Commission can be sure that the use of such material will be highly limited in quantity. In rebuttal, NAITP urges some other points: (1) the welfare of the "majors" is not a legitimate concern of the Commission (even less than that of our own broadcast licensees; (2) no heed should be paid to stations who talk about "cheap" game shows and then want to use movies which—not generally, but because they already have them—are just as "cheap" to them; (3) any relaxation here, as with the "off-network" restriction generally, will hurt employment in the production industry by encouraging the use of already-produced material. Metromedia in its comments urges that any relaxation as to "off-network" material would create an extremely serious loophole, because lots of programs could be labeled "movies". INTV stresses the extent to which the "majors" and other film distributors still have a TV market—independents, other times of the day, etc.

46. The "feature film" restriction, at least in the form adopted in 1970, was vigorously opposed by several parties, including especially the "majors"—particularly Warner Brothers, Screen Gems, MCA, and, in joint reply comments, MGM and United Artists—and the licensees of two top-50 market affiliates which use movies in the access period. WTIC–TV, Hartford, Conn., and WVEC–TV, Hampton-Norfolk, Va. (Peninsula). The "majors" urge that the rule is an illegal restraint on freedom of speech and licensee freedom of choice, and also an improper and invalid distinction against this form of program—which may represent material of extremely high appeal and quality—in favor of technically "new" material which may be neither truly new nor of value (game shows, etc.), and which under the rule may be run an infinite number of times. It is also claimed that any distinctions between "made for theatre" and "made for TV" films, and those broadcast on a network initially vis-a-vis those distributed for TV only by syndication, are arbitrary and invalid; since the film shown on networks tend to be better, it is obviously contrary to the public interest to discriminate against them in favor of films otherwise reaching television.[24] It is claimed by MGM and United Artists—who are concerned particularly with "made for theatre" product—that a restriction on "feature films" simply increases network dominance. The argument is that the good films will go to the networks, whereas in syndication a station can use the material only once every two years.

[24] In this respect as in some others, the proponents and opponents of a tight rule make a common objection, but reach opposite conclusions from it. NAITP claims that any discrimination between films on the basis of source or method of distribution is improper; therefore the ban on all should be permanent. The "majors", on the other hand, claim that there should be no restriction on any of them.

47. The majors also urge two other main lines of argument: (1) the 2-year restriction (or, indeed, any restriction) is contrary to other commission policies; and (2) their serious economic problems, resulting in part from regulation. In connection with the first, it is said that in Docket 18179 the Commission has expressed the view that there are too much "exclusivity" and too long "rest periods" involved in the showing of feature films, and in the Pay TV area we have adopted rules to present the "siphoning" of feature films away from free television; but here we are restricting any repetition of a film for at least two years, thus making a two-year "rest" period mandatory and preventing the full use of the product on free television which we adopted the "anti-siphoning" rules to protect. The matter of appropriate "rest" periods between exposures, it is said, should be left to the licensee. Second, it is claimed that the majors badly need relief from a number of adverse economic developments: the general and severe decline in theatre attendance during the last 25 years; declining sales of films to the networks and to TV stations via syndication (the latter declined from $94 million in 1970 to $49 million in 1971); and the "whipsawing" effect of restrictions on cable and pay TV usage on the one hand, and free-television usage under the prime time access rule on the other. It is said that the rule operates to severely curtail the "aftermarket", thus complicating these problems; and that a healthy motion-picture industry is as important as a healthy first-run syndication industry which the rule was expressly designed to further. In sum, the majors claim, the rule is not good, and should be repealed; certainly it should not be extended beyond the August 1970 provisions as applied in the November Public Notice. It is also claimed that the rule is basically unnecessary; movies occupied only 4.5% of access-period time in 1972–73, and only 7.1% in 1971–72.

48. The two licensees mentioned raise some of the same and other points. Peninsula (WVEC–TV) raises the scheduling problem; to the extent that films are barred entirely from access time, it is often difficult to show them at all,[25] and the station cannot recover the cost unless it can get two showings in access time (out of 5 showings in 5 years which is the customary basis on which film is licensed to stations). It is also claimed that it is simply ridiculous to bar from access time, and keep the public from seeing, a package which Peninsula is considering buying from MGM, of made-for-theatre material—thus with no "network control"—which ran on the network 5 or 6 years ago and thus would be largely new to the audience. It is claimed that it should be up to the licensee to decide what "rest" period is appropriate, and whether a package of this sort is desirable for early-evening use, and also that the rule hurts the station economically in that it cannot make full use of its inventory of 1,500 titles (an investment of $275,000). WTIC–TV, Hartford, the other station commenting on this point, urges that a permanent bar on network-shown movies is extremely restrictive in effect; there were some 549 titles available for purchase in the Hartford-New Haven market at the beginning of 1973, and of these, 397 or 72% were off-network. Even higher was the

[25] CBS Affiliates points out that a restriction on access-time usage means that a given movie—e.g., one suitable for young viewers—cannot start at 7:30, but must start after 8 p.m.

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percentage of the movies the licensee regards as "suitable" for early-evening showing judging by the title; of 183 such films, 151 or 83% were off-network.[26]

III. COMMENT ON VARIOUS OTHER RULE-MAKING PROPOSALS IN THE NOTICE

49. There are discussed in this section the comments concerning various specific changes in the rule advanced in the Notice of Inquiry and Proposed Rule Making herein (other than "off-network" and "feature film" changes discussed above), and also two other proposals advanced in comments. In some cases, involving fairly simple and non-controversial matters, our conclusions are set forth.

A. Changes related to time in different locations ("daylight saving" and time-zone differences).

50. *Daylight Saving Time*—We are adopting herein, as set forth in Appendix A, the rather simple proposal set forth in the Notice herein (Notice, par. 32(a)) providing that where one of the "top 50 market" cities in the Eastern and Central time zones does not observe daylight saving time (e.g., Indianapolis), "prime time" in that market is an hour earlier, during the "daylight saving" portion of the year, than it would be otherwise. This proposal drew some support and no opposition in the comments. Two points should be noted: (1) we are adding a provision, in light of certain developments late this summer regarding Indianapolis, that where a station wishes to follow a general practice of delaying network programing an hour during this period, upon notification to the Commission, it may use the regular prime time hours for its time zone (e.g., 7–11 p.m. E.T. in Indianapolis); (2) We are not extending this rule to Phoenix, Arizona, the other large city not observing daylight time in 1973, as to which no comments were submitted, and where Mountain time is already two hours behind New York time even without this adjustment. If there are problems there, they can be handled by waiver. The general adoption of year-round daylight saving time recently may have rendered this a less significant matter, but it appears that at least one market (Indianapolis) will still be involved, and accordingly the change is adopted.

51. *Time-zone differences.* The Notice herein (par. 32(b), 33 and 34) invited comments on a possible change in the rule urged by NBC previously in our 1972 proceeding concerning prime hours in the Mountain time zone (Docket 19475), and also involved in a number of waiver requests by NBC and certain individual stations (e.g., *Academy Awards and Miss America programs*, 33 FCC 2d 987 (1972)). NBC's proposal relates essentially to evenings when the network's programing includes special material, such as sports or special events such as the Academy Awards or Miss America pageant, which is broadcast simultaneously throughout the 48 states (unlike most regular network programing, which is delayed in the West). It is designed to permit viewers in the Mountain and Pacific time zones to watch the same network programs as Eastern and Central time zone viewers on these

[26] We also note a suggestion by the licensee of Station WHTN–TV, Huntington, W. Va., that the present two-year restriction be modified so as to apply only as to previous showings in prime time. It is claimed that movies shown at other times reach largely different audiences so that they should be disregarded for this purpose.

evenings, for example by presenting after the special event, in the West, other network programs which have been shown before it in the East (e.g., the *Academy Awards* telecast begins at 10 p.m. E.T., and runs until shortly after midnight, and it has been preceded by two hours of regular NBC programs; the event starts at 7 p.m. P.T., and runs till shortly after 9 p.m. P.T., and NBC wants to present, in that area during the remainder of prime time, the same two hours of regular NBC material).[27] NBC's proposal is that on evenings where there are such simultaneous telecasts, a schedule of network programing which complies with the rule in the East should also be regarded as complying in the West (if it includes only the network's evening programing for that day).

52. There was relatively little discussion of this in the comments, the only real opposition being that of INTV, opposing any waiver of this sort except where the network devotes its entire prime-time broadcasting in an evening to the same programing. Some of the proponents of the rule (ABC and Metromedia) expressed support for such relaxation in the Mountain time zone, whose two or three markets in the top 50 are not crucial to the rule's objectives. NBC advanced two general arguments in support of its proposal: (1) particularly in the Mountain zone, any restriction affects stations outside of the top 50 markets and not within the rule, since the stations in Denver, Salt Lake City, etc., feed programs to smaller-market stations; (2) in these Western zones, there is actually less network broadcasting than there is elsewhere on these days. It was claimed that in the absence of liberalization or waiver, these Western stations are going to have to forego these special events or cut them short, or forego the other, regular network material.

B. "21 hours a week"

53. Since the rule went into effect in October 1971, one of the complaints against it, and the source of a number of waiver requests, has been the alleged lack of "flexibility" entailed in the "three hours per night" limitation. It has been claimed that stations should be free to rearrange their schedules so as to present more than three hours of network or off-network material some nights, compensated by a cutback on other nights of the same week, so as to be governed in effect by a "21 hours a week" instead of a "3 hours a night" standard. After some actions early in 1971, the Commission has usually refused to permit such rearrangement on a regular basis, although it has been permitted in "one time" situations, such as "making up" network programs preempted on a particular evening for local sports. The Notice herein (pars. 29–31) invited comments on modification, either to a flat "21 hours a week" or various possible changes not going that far (deviations one or two nights a month, or regularly where necessary to clear for news plus an hour-long program, or 21 hours a week but continuing to present a half-hour of "eligible" material each night).

[27] A variation of this situation—really a "sports runover" problem—is where an event such as the World Series starts at 8 p.m. E.T., or 5 p.m. P.T., and runs until about 11 p.m. E.T. or 8 p.m. P.T. NBC has requested, and we have granted, waiver so that West Coast stations may "assume" the event runs only one hour into their prime time, and they may run two additional hours of "off-network" material. See 37 FCC 2d 110 (September 1972).

54. The flat "21 hours a week" concept drew little support and considerable opposition, from the staunch proponents of the rule, licensees, networks and others. It was feared that networks or individual stations (or both) would rearrange their schedules from time to time in such a way as to preclude the presentation of first-run material on a regular basis so as to build a regular audience. Thus, the networks could put all of their 21 hours on six nights, leaving a "junk night" for the presentation of the station's required non-network material, or at least juggle their "special" programs to achieve somewhat the same result. The networks, similarly, feared station rearrangement of network programs which would destroy "audience flow" and network ability to guarantee advertisers a particular time slot. CBS claimed that the only significant result would be an increase in use of local movies on certain nights; Metromedia said there would be enough "flexibility" to subvert the rule. The disadvantage of juxtaposing "access-period" programs on one station and network programs on others (to the detriment of the former) was also asserted, along with the uncertainty for independent producers as to what time period, and therefore what audience, they should produce for. In short, highly desirable certainty and stability would be impaired.

55. However, there was some support, particularly in reply comments, for partially moving in this direction, for example, permitting stations to present up to 3½ hours of network or off-network material on two nights a week and to reduce to 2½ hours on two other nights. NAITP suggested that this be permitted only for networks (not stations), only if they notify the stations long in advance, and only if all "cleared" time after 7:30 E.T. is contiguous. With this relaxation, it was said, there would be no excuse for waivers. Metromedia, while stating it saw no real need for change, suggested that the "long" network evenings be on weekdays, and that stations have an option of going to such an arrangement or following the present rule. ABC's reply comments were to the same general effect. It was claimed that this would give more flexibility to networks, stations and non-network sources, for example, permitting the "clearing" of an hour-long period after the news on some nights (said to be one of the limitations of present practice under the rule), and non-network program access to the larger after-8 audiences, and giving the networks a chance to start programs such as children's "specials" at a desirably early hour on other nights (this has been a source of substantial complaint under the rule).

C. Sports "runovers" and other sports waivers

56. Paragraphs 35–56 of the Notice herein requested comments on the appropriate policy for the future with respect to waiver of exemption for "sports runovers" situations, which have given rise to numerous waiver requests, chiefly by the networks, which have generally been granted. These are situations—chiefly late-afternoon network broadcasts on weekends or holidays—when the event begins at an hour such as 4 p.m. E.T., and normally would be expected to con-

clude before the beginning of prime time at 7, but, if weather delays, overtime, etc., occur, may not conclude by the anticipated time.[28] "Footnote 35" of the Report and Order adopting the rule (23 FCC 2d 382, 395) stated that waiver requests would be considered in such circumstances. Waiver is of course not necessary for complete coverage of the event itself, but to enable the network to carry it plus the regular three hours of prime time evening material later. The Notice advanced the following possibilities: (1) a required "roll-back" of evening schedules following such a runover, so as to leave a full hour for non-network material during prime time (e.g., if the sports event runs until 7:10 p.m. E.T., network evening programing could not start until 8:10 p.m.); (2) simply assuming that events of various types will last a certain length of time, and ignoring any runovers if the events as scheduled would normally be completed within that time (e.g., 3 hours for baseball and football, 2 hours 15 minutes for basketball); (3) requiring the networks, if there is such a "runover" by more than 5 minutes or 10 minutes, to "give back" a half-hour of time within the next few days; (4) granting a blanket exemption to certain events of great appeal such as the World Series, the Super Bowl, New Year's Day and other college bowl games, Olympic coverage, and possibly some, but few, others.

57. Most of the commenting parties favored either the *status quo* or the second proposal above, ignoring runovers if the scheduling has been reasonable. ABC, NBC et al stated that the present arrangement has worked reasonably well, with few runovers in fact (only 6 for ABC and 14 for NBC in more than a year's operation through the end of 1972) and those small, usually five minutes or less (ABC's six totalled some 31½ minutes; of NBC's 14, 8 were 5 minutes or less, and some others ran over half an hour). It was also urged that these highly attractive events should be permitted to run to completion (since in other connections we have recognized their importance), and that very occasional runovers do not affect the demand for non-network programing since stations cannot count on it.[29] The "roll-back" and "give-back" proposals above were labelled "administrative overkill", and described by NBC as highly impractical (e.g., where more than one game is presented on the network on a given day) [30] or unfair (the "give-back" would put the networks and stations to a difficult decision as to whether to carry the event to completion and give back a half-hour later, or not). In sum, flexibility would be jeopardized without any benefit. Some proponents, such as INTV and Metromedia in reply comments, took basically the same position favoring the second proposal above, based on reasonable scheduling.

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[28] Such "runovers" may also occur in connection with evening sports events, but in such cases the runover typically occurs outside of prime time, in the Eastern and Central zones, and therefore they fall into the category of time-zone difference situations already discussed.

[29] In paragraph 36 and elsewhere in the Notice, we asked for information as to the effect of such runovers, particularly when short, on the use of and thus the demand for non-network program material. No specific information was supplied; as indicated in the text, some of the networks and others said there is little real effect, and NAITP did not deal with this question.

[30] NBC asserts that "rollbacks" occur at times in network operations, but only in unusual circumstances and with the consent of the affiliates to the special arrangements involved.

58. NAITP had a different proposal: since, assertedly, the networks are responsible for these situations both by their basic decision to "clear" early prime time and by the scheduling of these sports events, they should have the burden of adjusting them—either by scheduling in a different manner so as to completely avoid the possibility, or by giving up the commercial positions in the "runover" period to the local stations to run the local commercials they would have carried in the absence of the runover. This would assertedly avoid the troublesome problem of "making good" to the advertiser the commercial time lost (said to be a problem between stations and program producers). It was also pointed out that the loss of a local commercial position costs the station considerably more than does the loss of a network commercial.

59. The matter of "post game" shows drew some comment, NAITP taking the position that these should never be permitted by way of waiver, since they could be run early in network time rather than immediately following the event. ABC agreed with a general policy not to accommodate these, as did NBC but only on condition that there be a general waiver for a number of "important" sports events. As to the latter, some parties, including proponent Metromedia, favored a blanket exemption for the World Series, the Super Bowl and the Olympics; NBC would go much further and include baseball and football division or conference playoffs, as well as NCAA, NIT and professional basketball playoffs, and Stanley Cup hockey. NAITP argued against any exemption by specific event, asserting that this would discriminate against growing sports such as soccer and tennis, and provide a growing loophole as "playoff" arrangements increase.[31]

D. Exemption for network news if preceded by a full hour of local news

60. Paragraphs 45(a) and 46 of the Notice invited comments on whether we should continue, for the future, a policy adopted by general waiver (envisaged by "footnote 36" of the Report and Order adopting the rule, 23 FCC 2d 382, 395) exempting, from the three-hour limitation on network material during prime time, regular network newscasts if carried at the beginning of prime time (7 p.m. E.T., 6 p.m. C.T. and M.T.) preceded by an hour of local news or public affairs material. The basic reason for this concept was that stations would comply with the rule if they carried a half-hour at 7 p.m., as numerous stations did and some still do; but there seemed no reason to arbitrarily force stations to this "bracketing" type of scheduling if they did not wish voluntarily to adopt it. It was also pointed out in a later decision granting such waiver that it may tend to promote an hour of local news or public affairs coverage, including "in-depth" treatment of important local matters which should be encouraged. About 25 top 50-market affiliates operated under this

[31] The 1972 denial of ABC's waiver request for 3½ hours of Summer Olympic coverage—probably the most controversial action taken by the Commission under the rule—is regarded by most commenting parties (on both sides) as wrong, and it would be changed under either of two approaches urged—an exemption for specific sports events as mentioned in the text, or, under NAITP AND INTV proposals, by blanket exemption to permit additional material where the network devotes all of its prime time to one kind of "special" programing.

waiver in 1971–72, and about 23 do so this year, roughly half the number which carry a half-hour of local news at the beginning of prime time.

61. Some parties, such as proponent Metromedia and opponent CBS Affiliates, supported this as a desirable concept, promoting local news efforts. Others on both sides were opposed, on the ground that it represents an impermissible "quality" judgment that an additional local half-hour is better than something else would be, or inordinate "government fine-tuning". INTV opposed the concept both because of the impact on the availability of time to new non-network material and because stations should not have to be "bribed" in this fashion to fulfill their public-interest obligations if this requires a full local news hour. CBS and ABC, for the latter reason, urged that the same privilege should be accorded stations which present previously a local half-hour (which practically all do). It was also urged that stations should be permitted to make their own scheduling judgments, including getting, for network news, the greater audience after 7 p.m. if they choose to do so. NAITP, while basically against this exemption concept, suggested that it could serve a useful purpose if it were modified to require an hour of local news or local or syndicated public affairs material, which would encourage non-network production of such material (hitherto largely a network preserve) and tend to achieve presentation of such "serious" material opposite similar material rather than its having to compete with more popular entertainment programs.

E. News and public affairs generally

62. In paragraphs 45(a) and 47 of the Notice herein, we raised the question as to what the future policy should be with respect to network news and public affairs programs generally—whether we should continue, or terminate, the waiver granted up to now for "one-time" programs of this nature (those not part of a regular series), or whether we should go further—as some parties, including some members of the Commission, have urged in the past—and grant a complete exemption for such material.[32] As we have pointed out on a number of occasions, there are important considerations involved here which to some degree may conflict: on the one hand, the importance of providing such material for the information of the public on significant issues, and, on the other, the importance of the presentation of such material from "diverse and antagonistic sources," so that all significant viewpoints may have a chance to be heard.

63. Comments on the subject were sharply divided. Four staunch proponents of the rule (NAITP, INTV, Westinghouse and Metromedia) urged that the networks do not need access time to do this material and should not have to be "bribed" in this fashion, but rather made to do it "on their own time"; that this exemption simply helps to

[32] The rule contains an exception for network programing which is "special news programs dealing with fast-breaking news events, on the spot coverage of news events . . ." No party opposed continuation of this exemption as such. However, the Notice pointed out that if waiver for "one-time" network programing of this sort is not to be continued, it might be necessary to define these concepts more exactly, and NAITP stated that any use of film in such programs should have to be strictly incidental. INTV urged that the quoted definition be tightened so as to make it clear that it refers only to "one-time only" news coverage, not regular network newscasts.

preserve the virtual network monopoly in this area where diversity is highly important, and discourage new sources which, *inter alia*, could contribute by treating general matters from a regional or local standpoint; and that such material is now available from non-network sources to some extent, and will be to a greater extent if the sources can have assured access to prime time. (Metromedia refers to the Wolper-Metromedia-Xerox documentary on China, rejected by the networks and then successful in syndication). The three networks and some individual licensees vigorously supported a total exemption for news and public affairs or, at least, the present blanket waiver. The longest discussion was that of CBS, urging that a general exemption is required (to avoid having to pass on any specific material, which would present First Amendment problems) and that this whole restriction flies in the face of a number of cases stressing the importance of freedom of expression, with *Mount Mansfield* not really to the contrary because that decision (like the rule) dealt chiefly with entertainment programing. CBS claimed that this material, because of its high cost and relatively little return, has been and will be left largely to the networks to provide, certainly as to "hard news" and most documentaries, and any restriction has a chilling effect on the wide dissemination of material from diverse sources. Having to do this on "the network's own time" would be a real burden and not provide the "breathing space" required for such broadcast activities.

64. CBS referred to some specific programs or types of material. On December 26, 1972, the date of the late President Truman's death, CBS presented two programs about him and his career, one at 7:30 and one at 11:30 p.m. CBS asserted that there should not be any question about the propriety of either of these under the rule. The question was also raised as to four types of material, how they could be presented under a strictly applied rule (particularly if all the law under Section 315 is held to be applicable). These were: (1) political broadcasts which are not really a candidate "use," such as Governor Connally's address in support of President Nixon last year; (2) other "political" material such as the *Democratic National Telethon* program; (3) documentaries of high importance in connection with current issues but not quite "hard news," such as the CBS 1970 program "The Senate and the War"; (4) material required to fulfill the network's and its affiliates' Fairness Doctrine obligations such as the "Loyal Opposition" type of program.[33]

65. *Political uses.* The rule also contains an exemption for network programs which are "political broadcasts by legally qualified candidates for public office." The Notice proposed nothing on this subject; a few parties commented on the matter. NBC, INTV and NAITP all urged that the exemption be expanded to political broadcasts whether or not they are a "use," for example the Connally address mentioned above, the Democratic telethon, etc. NAITP had one proposal in the

[33] In reply comments NAITP's comment on these specific matters was that much of the material would be exempt under its proposed definition of "political programs," or otherwise; as to the fairness doctrine point, if CBS presented in its own prime time a program giving rise to such an obligation, why should it not present the balancing program on its own time also; and as to the two Truman programs, why should not CBS present these in its own prime time (especially since it ran one of them entirely after prime time).

nature of a restriction; that before the exemption applies, it would have to be established that the network had not refused the candidate or other proposed user later prime time if he requested it.

F. The "Wolper proposal"

66. The entity now called the Wolper Organization, Inc., headed by David Wolper, has long been a well-known producer of "special" programs, including documentaries (e.g., the *Appointment with Destiny* and *National Geographic* series). In its comments herein, it took no position as to the basic rule, but asked for a provision designed to promote the presentation of so-called "educational value" programming from independent production sources. This was defined as "programs of a factual nature produced by independent production companies and involving subject matter of a scientific, cultural, historical, anthropological or other educational nature." The request is that if the rule is continued, such material be exempt from its provisions both as to network showing and later "off-network" distribution; or, if the rule is repealed, there be a requirement that the networks each devote an hour a week to such material.

67. Wolper's argument basically is the network exhibition is the only way this material—very costly at least as Wolper produces it—can be produced and distributed at all. Wolper emphasizes that it is not talking about a "panel discussion," or a program with a lecturer and a blackboard, but much more elaborate material which will have considerable "mass appeal" as well as educational value, and that typically this costs from $250,000 to $400,000 for a single one-hour program, in direct costs alone. It can recover these direct costs from the first network run, relying on network reruns, off-network sales, sales to schools, etc. for its profit later, but even recovery of initial direct costs is far beyond any potential income from syndicated distribution, either by direct sale or barter. Syndication is more expensive anyhow, with a 35% distribution fee (Wolper is not itself in the syndication business) and $5,000–$10,000 per program for additional prints and shipping. In any event, individual stations will not buy without seeing a program; and these cannot be produced "on speculation." Rather, Wolper must rely on the network process, and it states that network prime-time clearance—difficult under any circumstances, because the networks are reluctant to preempt their regular programs and often do not use "outside" documentaries—is virtually impossible with the curtailment of network prime time resulting from the rule. It is claimed that there are numerous large corporate sponsors willing and anxious to sponsor such material, in promotion of their corporate image rather than for hard product-selling; and with pressure from such enterprises and Wolper's past ratings successes it is possible to get network prime-time placement in the absence of the rule's restriction, but not with it in effect. It is also claimed that the "off-network" market—relatively large because this material has a rather long life—is necessary to justify the risks involved. Wolper states that it is simply asking for access to prime time for its material and similar programs, not necessarily as expensive, produced by others, in a fashion which will clearly further the public interest by encouraging the use of such material but not

involve any *ad hoc* waivers or "quality" judgments. Wolper claims that the character of access-period programing so far shows the impossibility of presenting Wolper-type material on a syndicated basis.

68. This proposal was supported in reply comments by two similar organizations. It was vigorously opposed by NAITP, as a "censor's dream," involving the Commission deeply in judgments about what kind of programs are "worthwhile," e.g., a dubious "fact-fiction" distinction, and also presenting very substantial definitional problems. NAITP pointed out that, for example, "game shows" could well be included, since they are factual rather than fictional and often involve informational matters (quizzes, etc.). Wolper also submitted reply comments, devoted to a legal argument in support of using its proposed program classification, and to an attempted rebuttal of Metromedia arguments that documentaries can feasibly be produced for distribution via syndication.

IV. OTHER MATTERS

69. We discuss in this section the comments on various other subjects; (1) those concerning the matters raised in the Inquiry portion of the Notice herein, Section C (pars. 51 to 57); (2) various problems and possible approaches suggested by some of the opponents of the rule in dealing with the matter of network domination, if, as they urge, the approach represented by the prime time access rule is abandoned; and (3) appropriate effective dates for rule changes.

A. Subjects in the inquiry portion of the Notice

70. In the Inquiry portion of the Notice herein, comments were invited on four general types of changes in the rule:

(a) Extension of the scope of the rule either as to time (e.g., making the "access period" 1½ hours per night instead of one hour) or as to the number of markets covered, possibly to all having three or more affiliated stations; or extending the "off-network" and "feature film" restrictions to independent stations, or at least to independent VHF stations in the top 50 markets.

(b) Possibly requiring a certain amount of the "cleared time" of the access period to be devoted to certain types of programs, such as local "live" programs, programs of particular significance to minority groups or children, or those relating particularly to the important problems of the community as the station has ascertained them (usually local but also possibly including syndicated programs as well);

(c) Encouraging the presentation of the same kinds of material by exemption from the rule's restrictions on network and "off-network" material.

(d) Changing the form of the rule so as to specify a particular hour as the "access period", e.g., 9–10 p.m. E.T. or 8–9 p.m. C.T. (the third hour of prime time).

71. *Extensions in the markets or time covered.* Several parties commented in this area, nearly all adversely. The opponents of the rule asked why a bad rule should be extended; proponents asserted that what is needed is affirmance and vigorous application, and working out the rule's problems, not extension. It was said that the present rule

gives a substantial economic base for non-network programing. There is no need to expand the rule to cover other markets, because it would add nothing significant in terms of economic support, and could harm smaller-market stations with their thinner economic base.

72. *Extension to independent stations.* ABC and some other parties expressed mild support for extending the "off-network" and "feature film" restrictions to independent stations, particularly VHF, since they are potential customers for first-run product and that product would be helped, audience-wise, if it did not have to compete with popular off-network material; but ABC also suggested that many such stations are already complying with the rule by presenting an hour of "eligible" material each evening, so that a suitable and effective rule would be hard to draft. CBS and CBS Affiliates expressed approval of this theoretically, to remove discrimination; but likewise doubted that it would have much effect and at best would represent more "Government intrusion"; and urged that the rule be repealed instead. Metromedia (with 5 independent stations) and INTV naturally expressed vigorous opposition, stressing the basically different position of independent stations (who must buy their programing) as against "network-riding" affiliates, with long-standing disadvantages to the independents now being partly corrected by the rule. Other arguments, such as the need for at least some "after-market" for network programing which independents now provide, were also stressed.

73. *Requiring or encouraging certain types of programs.* The proposals to require or encourage (by exemption) certain types of material drew general opposition, as involving simply further Government intrusion into programing decisions which are supposed to be for the licensee, subjective and sometimes unwarranted judgments that certain types of programs are generally preferable (e.g., mediocre local vis-a-vis highly worthwhile non-local), and serious definitional problems—e.g., are *Bridget Loves Bernie* and *Sanford and Son* to be considered "minority" programs, and how could a "children's program" possibly be defined for this purpose? It was also urged by ABC that emphasis on either local programing, or on network programing of certain types by way of exemption, might work to frustrate one of the rules' key objectives: encouraging the production of independent first-run syndicated material. It was claimed that the rule is already working to further the objectives which might be promoted by such regulations, e.g., the increase in local prime-time material, and no additional impetus is needed. It was asserted that any approach of this sort would simply breed requests for the inclusion of other types of programs in the "approved" or "preferred" categories, and any exemption for network programing of certain types would simply increase the uncertainty on the part of independent producers as to how much and what time will be available for their products. It was also contended that the renewal process may and should be looked to in order to achieve desired results in the area of meeting particular local needs.

B. Alternative approaches to the problems of "network dominance"

74. Some parties opposing the basic rule—notably some of the "majors" and Screen Actors Guild et al—asserted that "network domi-

nation" and how to control it are a major problem, even though the present rule is not a suitable, and indeed is a counterproductive, approach to meeting it. Various matters were mentioned, including the semi-permanent affiliation relationship, low interconnection costs, and control of non-network programing and its development through their owned stations, as all entering into the basic situation of network dominance. None of the parties advanced really specific proposals in this area; some approaches touched on generally were possibly getting the networks out of entertainment program production (a potential threat of great leverage in dealing with program suppliers), opening network prime time to program sources generally (such as the "50–50" rule originally proposed herein) and making sure that stations are able to preempt network programs without fear of reprisal. At oral argument, the matter of possible network pressure on producers to use their facilities was mentioned.

C. Effective date of rule changes

75. Paragraph 28 of the Notice herein asked for comment on appropriate effective dates of various rule changes which might be adopted herein. Of the parties commenting on this point, some, chiefly the "majors" Warner Brothers and MCA, urged repeal effective almost immediately, or for the 1973–74 broadcast season. It was urged that the rule is clearly contrary to the public interest and therefore should be repealed as quickly as possible, without taking into account the asserted private claims of parties that quick repeal will harm them. It was also urged that this is possible: the networks can accelerate programing projects already on the drawing board, and there was reference to a telegraphic comment from QM Productions, a smaller producer opposing the rule, stating that CBS has been able to get delivery of a series three months after it ordered it. Warner Brothers also urged that at least the rule should be repealed effective January 1974, when the networks normally make substantial programing changes anyhow, sometimes as much as would be involved in expansion to 3½ hours a night. Some individual licensee opponents of the rule also requested "prompt" or "immediate" repeal, but without any specific target date or any discussion of this particular point.

76. On the other hand, other parties, including NBC as well as proponents ABC, Metromedia and INTV—urged that a longer period is necessary, and that at least as to any change such as repeal, or even a substantial relaxation to something like a "21 hours a week" standard, the effective date should be only the beginning of the 1974–75 season, or roughly October 1, 1974. This was urged basically for two reasons. First, Metromedia and ABC claimed that it would be most unfair and highly injurious to independent producers who have been relying on the rule—and who have had to proceed for the near future in spite of the uncertainty—to repeal the rule effective in 1973. ABC asserted that such parties would be seriously injured by a "cavalier" action of this sort. Metromedia urged that the Commission should not put in jeopardy those who have risked substantial money and effort in attempting to bring life and substance to the rule's objectives. ABC and NBC also emphasized the need for adequate lead time in program planning,

which begins some 18 months ahead of the season, or at least a year before. It was said that programing plans are made the previous summer, pilots are produced during the fall, the final program selection is made in the first two months or so of the calendar year, and then scheduling and selling begin. It was claimed that at least this much time is necessary for orderly planning, and much less will lead to network programing of lower quality and thus defeat the purpose of repeal or relaxation. CBS did not take any position on this point in its comments, but at oral argument stated that while the rule should definitely be repealed, this should not be effective before September 1975—CBS needs that much lead time to develop programing.

A. The Rule adopted and the basic reasons for it

77. *The rule adopted.* As outlined in paragraph 3, above, the rule adopted herein provides:

(a) There will be no restrictions on the 7–7:30 period (6–6:30 C.T. and M.T.), nor on Sunday 7:30–8 p.m. (6:30–7 C.T. and M.T.).

(b) As to the remainder of what is now prime time, the only restrictions relate to the 7:30–8 p.m. period (6:30–7 C.T. and M.T.), Monday through Saturday. Of these six half-hours, at least five must be devoted to programing (local or syndicated) which is neither network, off-network nor feature film. The sixth half-hour must be devoted to the same use except to the extent that it may be devoted to network or off-network programs which are either children's "specials" (*Cinderella*, *The Grinch*, *Charlie Brown* programs, etc.) or public affairs or documentary programs. The latter are defined as "any program which is nonfictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program." See paragraph 88, below, concerning uses which the Commission will expect licensees to make of an appropriate portion of these "cleared" periods.

(c) The rule also contains provisions—not immediately pertinent to the basic analysis, and therefore discussed briefly later rather than here—to deal with sports runovers (to the small extent necessary now that the rule applies only after 7:30), time-zone differences, where "simultaneous" programing is involved, and "Summer Olympic" type situations where the network devotes all of its prime time to a special type of programing and wishes to extend it to the 7:30 half-hour.

78. Thus, there are essentially five areas of change (in addition to the expectation concerning use of part of the "cleared" time for material of particular local significance): (1) the removal of all restrictions on the first half-hour; (2) permitting an increase in network programming on Sunday of up to an hour, or a total of four hours; (3) tying "cleared" prime time specifically to the second half-hour of prime time Monday–Saturday (7:30–8 p.m. E.T. and P.T., 6:30–7 p.m. C.T. and M.T.): (4) permiting one of these six half-hours to be used for network or off-network material of certain types—children's "specials" or public affairs or documentary material: and (5) barring "feature film" entirely from these six half-hours.

79. *Reasons for removal of 7–7:30 p.m. restrictions.* We have been prompted to remove restrictions from the first half-hour of present prime time (7–7:30 E.T. and P.T., 6–6:30 C.T. and M.T.) by various considerations. First, as far as Monday–Friday is concerned, the use of this period by top-50-market affiliated stations represents singularly little in the way of opportunity for the development of really new syndicated material. This was true before the rule—when this was "station time" not used by the networks—and it has continued to be true, since the basic programing pattern has not changed much except that stripped game shows have increased their share of the time by the elimination of stripped off-network shows such as *I Love Lucy* and *Dragnet*. Four of the six stripped games shows now involved—*Truth or Consequences*, *To Tell the Truth*, *What's My Line* and *Beat the Clock*—were shown in this time slot on top-50-market affiliated stations before the rule, although not as much as now. As shown in Appendix C, of 139 affiliated stations in 46 of the top 50 markets, 66 present local or network news (the latter under waiver) at this time, and another three show blocks of movies, which are not "new" material. Of the remaining 70 stations, 56 strip one of the six game shows mentioned, and at most 14 present what could be called "new" material—two stripping the *Merv Griffin* talk show, and 12 presenting "variegated" programing, pretty much a different access-period program each night. Thus, only about 10% of the stations covered, one in the top 10 markets, present material which needs the rule's encouragement.[34] We do not view a contest between stripped game shows and stripped off-network material as one the Commission can profitably get into. This consideration does not apply particularly to the weekend, but we have concluded that some increase in network programing should be permitted, and Sunday appears a desirable time for this, including the 7 as well as 7:30 half-hours, traditionally a popular family entertainment network period. There seems little point in maintaining a restriction only for Saturdays. Thus, in this respect, it appears that maintenance of the rule's requirements with respect to the first half-hour would be a restraint without sufficient justification.

80. There are also some problems in connection with the present restriction on the first half-hour, and more are beginning to develop. The "network news" waiver arrangement has worked reasonably well so far, but we are faced with increasing demands for its relaxation, including the arguments mentioned in par. 61, above, requests for waiver in connection with ABC's *Reasoner Report* program (to permit it to be carried after 7 on Saturday or Sunday), requests to carry network news at 7 on Saturday or Sunday when a sports event preempts the station's usual hour for network news, and a request in comments herein (which might have public interest benefits) to permit network news at 7 in markets where there is now none (without a preceding full local hour). The possibility of increasing network news time from its present half-hour has also been mentioned, a development which might

[34] The situation seems to bear out the Westinghouse statement, made in response to petitions for reconsideration of the rule filed in 1970, that it is not absolutely necessary to apply the same restrictions to this period as to the 7:30 half-hour.

well be in the public interest. These are not insoluble or terribly difficult questions, but they would require some careful adjustments; and in view of the very little benefit accruing from this period to the cause of promoting really new non-network programing, we conclude that the need for such "fine tuning" should be dispensed with. There is also another consideration: for reasons discussed below, we have decided to adopt herein two provisions which in some ways cut down licensee flexibility compared to what it is now—barring feature film entirely from the six Monday–Saturday 7:30–8 p.m. periods, and requiring that these specific periods, and not simply an equivalent amount of prime time during an evening or a week, be cleared of network and off-network material. It is therefore appropriate to provide stations with some compensating flexibility elsewhere, and, in view of the small contribution which these hours make to the development of really new material, the best course is to provide for this flexibility during the first half-hour of prime time. Thus, for example, on Saturdays (or any other day, for that matter) a station may present a feature film from 6:00 to 7:30 or a one-hour off-network show from 6:30 to 7:30. Moreover, this action may, to some extent relieve the problems of the "majors" and similar parties, by increasing the after-market for former network material.

81. In reaching this decision, we recognize that it may in some cases work to the disadvantage of independent stations, in that they may for the first time under the rule be faced with the competition of popular off-network material during the first half-hour. However, we do not regard this as a serious reason not to adopt this change. While probably the advantage which the independents have at present for a full hour is, overall, in the public interest, nonetheless the rule in this respect represents a form of disparate treatment of competing entities, and therefore should not be carried further than it can really be justified. We conclude that the remaining half-hour of this advantage to the independents is sufficient to satisfy the demands of the public interest.

82. *The network increase and retention of five or six "cleared" half-hours.* In these respects—which are probably the crux of the decision we are required to make at this time in this proceeding, representing an adjustment of competing demands for access or for exclusive access—we have reached what, at this point, appears an appropriate balance. This provides the networks with opportunity to increase their programing by one or two half-hours, Sundays from 7 to 8 or half of that hour, and reserves either five or six half-hours per week cleared of network programing or off-network material or feature film.[35] It may be that, like many compromises, this will entirely please no one. It represents certain judgments which we believe are required by the material set forth above—that the performance under the rule so far certainly does not warrant the complete reservation to non-network material of the entire week's time, even of 7:30–8 half-hours; but conversely, particularly since the rule has not yet had an adequate test,

[35] The networks may, of course seek to clear programs during the first half-hour of prime time on any day if they wish to do so. However, in general they have never regularly programed this time any day but Sunday, except for a few Saturday sports events.

neither does its performance warrant either repeal or a really substantial reduction in cleared time such as to three or four half-hours a week. Both of these matters—evaluation of the rule's performance, and whether it has had a fair test up to now—are discussed below. In reaching the balance, we regard it as important to preserve substantial "cleared" time for the development of local programing efforts—one of the really significant benefits from the rule so far—and at the same time also to preserve considerable potential for the development of first-run syndicated programing. We emphasize that this is a judgment made in light of facts at this time, fairly early in the rule's existence and after it has an adverse life psychologically even if not otherwise.

83. *Permissible uses of one of the six periods.* We have provided that one of the six "cleared" periods may be used for network or off-network material if it is of certain types—children's "special" programs, public affairs or documentary material (the latter defined rather broadly). In reaching this decision, admittedly we have rejected the views of numerous parties who asserted that this is impermissible "quality judgment" of one kind of program as being better than another, making the Commission in effect a "national program director", inevitably leading to requests for similar preferred status for other types of material, and often presenting serious definitional problems. Bearing in mind the limited scope of the action taken—that it is *permissive*, not a requirement, and that it relates to only a half-hour a week—we do not conceive these objections to have merit. Moreover, our action reflects not so much a view that these kinds of materials are "worthwhile"—although admittedly this is a factor—as that under the present rule its presentation involves certain special problems. For about the last year, one of the most common complaints from viewers (including parents, educators, and children themselves) is that desirable and well-received children's "specials" such as *Cinderella*, *The Grinch that Stole Christmas* and the *Charlie Brown* programs, may start on the network only at 8 p.m. in the normal course of programing, and this makes them too late for children's viewing if they are to observe a reasonable bedtime hour. Therefore, it is desirable in the publice interest to facilitate the showing of such material earlier, if this is what stations choose to do. As to public affairs and related documentaries, one of the criticisms of the rule is that it has resulted in the total or partial disappearance of such material from prime time. The rule may well not be the sole, or even the major, cause of this; but in its present form it certainly does not make any easier the presentation of such programing, which is expensive and not commercially lucerative; and the rule should be changed to make such broadcasting easier. At least so far, there is relatively little new product of this type available from non-network sources.

84. Moreover, this relaxation will make easier certain other kinds of documentary material which is otherwise difficult under the rule, for example the kind of factual network documentaries mentioned by The Wolper Organization (par. 66 above), and off-network material, particularly that which is an hour long, such as the *National Geographic* and *America* series. In various "off-network" waiver actions we

have found such presentation to be in the public interest; but we agree with Westinghouse, NAITP and other proponents of the rule that this process is an undesirable one, getting the Commission, at least to some extent, into the evaluation of "program quality" with respect to individual material, and creating uncertainty on the part of independent producers (the "house of cards" or "floating crap game"). The rule change adopted affords leeway to permit stations to use such material if they choose to do so, without getting us into individual evaluations. This is the chief reason for not limiting the documentary exemption to those relating to news and public affairs.[36]

85. *Tying the cleared time specifically to the 7:30–8 p.m. period.* As mentioned earlier, one of the complaints against the rule has been its "lack of flexibility", in requiring one hour of "cleared" time every evening rather than permitting deviations to 3½ hours of network or off-network material on some nights with a corresponding cutback on other nights, or a flat weekly "21 hours a week" limitation on such material. The Notice proposals and the comments in this respect have been noted above. We are, of course, moving in the other direction in the rule amendment adopted herein, by specifying not only the amount of cleared time each evening Monday–Saturday, but the portion of the evening when it is to occur. We have done this in the interest of certainty and stability—letting networks and stations know what time will or will not be available for general use (for them and for their competitors as well) and giving independent producers a specific time-period, and therefore a particular composition of audience, to aim at. Moreover, there is substantial significance in the argument that it is better, at this still rather early stage of the rule, for "access period programing" to be shown opposite similar material on other stations, rather than to have it shown in competition with perhaps the most popular network shows (for example, stations affiliated with ABC or NBC might choose to present locally produced public affairs material opposite *All in the Family* on CBS, when they would likely not get a large share of the audience anyhow; and the same could apply to ABC and CBS affiliates vis-a-vis NBC's *Sanford and Son*). For these reasons, it appears that the cause of flexibility is outweighed by the additional stability and certainty thus gained—particularly with the flexibility which has been added with respect to the first half hour of prime time.

86. *Barring feature film from the 7:30 periods Monday-Saturday.* We have decided to bar feature film entirely from the 7:30–8 p.m. "access period" slots (6:30–7 p.m. C.T. and M.T.). This total ban was not proposed in the Notice, nor was it really urged as a proposal by any of the parties (although NAITP suggested that it would be the best way of promoting the rule's objective of encouraging new mate-

[36] We also realize that in a sense this action could be regarded as inconsistent with the Notice herein, in which we raised this question—permitting certain particular types of programs by way of exemption—in the Inquiry portion, among matters as to which we did not contemplate adopting rules without further proceedings. However, in view of the limited amount of time involved, the permissive rather than mandatory nature of the change, the extensive exploration which this subject received in comments in various connections, the fact that this is in effect a partial repeal of the rule, and the obvious interest in reaching a final and complete decision in this proceeding as early as possible, we find rule amendment at this time to be in the public interest.

rial, which feature films, either made-for-theatre or made-for-television, obviously are not). We conclude that this is an appropriate, and indeed the best, approach to what is otherwise a difficult and rather complex problem—how to apply such distinctions as "made for theatre" or "made for television", or previously shown on a network or not, or previously shown in the market within a given period or not (and if so, at what time of day they were shown). All of these distinctions were somewhat artificial at best, and served chiefly to provide a limitation on use of movies to fill "cleared" time, which is necessary if the production of new non-network material is to be encouraged. There appears to be merit in the arguments, by opponents of restrictions, that the present rule unduly restricts licensees in the selection of movies they believe desirable (whatever their origin or last telecast), and that stations should be able to present a movie fairly often during prime time in order to recover its high cost, if their judgment so indicates. Therefore, we believe it preferable to approach the objective directly, by removing restrictions on use of this or any material from the 7–7:30 p.m. time slot, and barring it completely at 7:30. This will enable stations, for example, to present a 90-minute movie on Saturday from 6 to 7:30 or indeed any other day of the week.

87. As shown in Appendix C, this does not involve a drastic change with respect to most stations. As of October 1973, three affiliated stations in the top 50 markets "strip" movies between 6:30 and 8 p.m. on weeknights, including ABC's two owned stations in California and a station in the Norfolk-Hampton area. The ABC stations followed the same practice in 1970, except that the movies were run from 6 to 7:30, and they may, of course, resume this practice. The Hampton-Norfolk station has so programed movies only since the rule, apparently because of the dearth of other non-network material it finds suitable, and is not entirely happy with this type of programing, according to its comments. With the removal of the 7 p.m. restrictions, it may be able to dispense with this practice without substantial impact. Some 15 other stations would be affected with respect to one (or in one case two) nights a week. We do not conclude this to equal the benefits which will flow from keeping 5 or 6 of the 7:30 segments free from this, as well as from network and off-network, material. Stations may, of course, preempt network time later, as a number do and long have done, if they wish to present their own movies, in addition to the 7 p.m. period mentioned.

88. *Use of "cleared" 7:30 periods for locally significant material.* It is important to set forth here our expectations in this connection. We expect that stations subject to the rule will devote an appropriate portion of this "cleared" time, or at least of total prime time, to material designed for children, material which is of particular significance with respect to interests, problems, and affairs of minority groups, and/or other material particularly directed to the needs and problems of the station's community or coverage area as disclosed in its regular efforts to ascertain community needs. Such programing efforts are necessary if the benefit of the rule in stimulating locally meaningful programing is to be significantly achieved, as well as to carry out the licensee's obligation to serve the public interest. We point out, however,

that programing of the significant character mentioned need not necessarily be all locally produced: a syndicated program such as *Black Omnibus* may well represent significant programing in the minority-affairs area.[37]

B. Discussion of significant arguments

89. *Whether the rule has had a fair test.* As mentioned in par. 32(2) above, the proponents and opponents of the rule differ sharply as to whether, at this point, the rule has had a fair test. In our view, it has not, at least in the sense that the somewhat mediocre showing so far can be regarded as showing that nothing different is to be expected in the future. As indicated above, this is one of our chief reasons for not moving further at this time in the direction of either repeal or of opening up more prime time (particularly former network time) to network programing and to those producers who prefer the network route. In reaching this conclusion, we note the rule's relatively new status—in the first half of its third year, with the first in a sense "a different ball game" in that off-network material and all feature film could be used—and the historic preference of stations and others for the "tried and true" which takes time to overcome (e.g., ABC's showing concerning the popular TV shows of the 1940's as being continuations of radio programs). Of equal, and perhaps greater, importance is the unfavorable climate which has prevailed, due to the uncertainty as to the rule's future, for a number of reasons mentioned previously. This would obviously tend to discourage the investment by producers in costly, and particularly in "novel", programing, and—as NAITP et al urge—might also discourage stations from being interested in such material, and of building an audience for it, when they have the easier and cheaper alternative of going with less expensive material (such as game shows, with a "track record") and thus simply showing greater profits for the short time the rule would likely be around.

90. In reaching this conclusion, we have noted the arguments of the opponents, particularly the "majors" and their representatives, that nothing different will develop in the future because of certain built-in factors which have been made manifest by now and which will not change. These include, notably, the asserted ceiling on the amount per episode a first-run syndicated program can be expected to gross (and the greater cost of distribution),[38] and the fact that stations will always tend to prefer cheaper material, such as inexpensive U.S. game shows (which have at least some degree of established popularity) or foreign "off-foreign network" product also available relatively cheaply. Undeniably, these may be long-term factors. But we believe

[37] Network programing during the uncleared portion of prime time may of course also make a significant contribution in this respect, where it deals with needs or problems common in substantial degree to many communities.

[38] This ceiling does not appear to be as low as the opponents claim (in the order of $50,000 per episode). Metromedia grossed over $80,000 (including foreign sales) for its 1971–72 *Primus* series, and expects to do about the same for *Dusty's Trail*, and *Let's Make a Deal* will have grossed $80,000 domestically, although it does not take anything like this to produce this game show. Moreover, it is clear from the record that producers such as Metromedia do not expect to make a profit, or necessarily break even, on the first run. Considering that there are savings possible compared to network production (talent will work for less, and there are other items) this ceiling is not too much below the $100,000-plus per half-hour cost figure estimated for network programs.

the rule has not yet had a test sufficient to demonstrate conclusively that these are, or will forever be, the iron-clad limitations which they are claimed to be. We note, for example, two new programs this season (*Dusty's Trail* and *Ozzie's Girls*) which have won wide station acceptance and which represent the re-entry and entry, respectively, of two of the industry's more powerful entities into production for first-run syndication. There is also the possibility—as ABC and others urge—that stations may be persuaded, with time and the firmer establishment of the whole idea of first-run syndicated material other than game shows, to pay prices higher than those they are now paying. Certainly, there is nothing inherent in their revenue picture to prevent this (see footnote 16, above).

91. In sum, while we do not believe the record is such as to warrant the complete restraint on network and off-network programing which the present rule provides, we do not believe the rule has had a sufficient test to demonstrate what its future performance will be, so as to warrant further abandonment of it, in view of the benefits accruing, such as stimulation of local programing efforts, a return to individual licensees of a portion of the decision-making process as to prime time, and opportunity for producers not choosing to operate through the networks.

92. *The programing record under the rule so far.* In light of our conclusion, immediately, above, that the rule has not yet had a fair test to determine its potential, we need not look too closely at the programing record under the rule so far. As set forth in Appendix C, based largely on the various filings by the major film producers (which was the most comprehensive of the program showings),[39] this can hardly be called distinguished, and there are certain developments which unquestionably are, as they should be, grounds for concern, and will be grounds for much greater concern if the picture, three years from now, is generally the same. These include such matters as a marked increase in the stripping of programs (generally game shows) in the 7:30 period (compared to the variety of network material presented then in 1970 and before),[40] and the increased use of foreign product, which—while it should not be prohibited or seriously discouraged—nonetheless cannot be regarded as a favorable result of the rule, since it means less use of U.S. material (and thus U.S. production activity and employment) and also likely these programs do not have the same overall potential for "relevance" as do programs produced here (dealing with current American themes and problems, etc.). Also, the greatly increased use of game shows itself can hardly be regarded as a favorable result of the rule, not necessarily as such but in view of the extent that these are either stripped in prime time or represent "sixth episodes" of game shows made for network daytime stripping. There

[39] As discussed in Appendix C, the "majors" exhibits have not been questioned for accuracy using the assumptions on which they were prepared, and our staff's check indicates that they are approximately correct on the same assumptions. The proponents of the rule strongly criticized them, *inter alia* for emphasizing the access-period time devoted to particular programs, rather than the number of programs actually available for access-period use. We find this objection without merit. The greatest program on earth is of no value to the public unless some station will buy it and show it.

[40] This is particularly true in situations where a station strips Mondays through Fridays two game shows, one at 7 and one at 7:30, and in markets where all three affiliated stations strip game shows at the same time.

has been a corresponding decline in other categories of programing, such as drama, and much of what there is is foreign product (in 1972–73 75% of dramatic-program time in the access period was devoted to foreign programs; the figure is considerably higher this year because of the demise of the *Young Dr. Kildare* series).

93. But the picture is by no means entirely unrelieved. For example, with the advent of two new U.S.-produced comedy programs in 1973, *Dusty's Trail* and *Ozzie's Girls*, there is more time in the access period devoted to comedy programs, and a much greater percentage of this is U.S.-produced than was previously true. Overall, the percentage of foreign product is down somewhat now compared to 1972, and local programing efforts have continued to increase. Programs of the nature-outdoor or "animal" category have also continued to expand in number and exposure.

94. Moreover, there are serious limits on the extent to which we can take action based on judgments in this area. We certainly do not agree with NAITP et al. that we cannot properly look at the character of the resulting programing at all; but certainly any operational judgments based on such a look must be made with circumspection. Otherwise, we find ourselves tending to impose our own judgments as to what is or is not "program quality", an "over-used" or "under-used" type of material. There is the additional problem of what any judgment of program quality would use as a basis for comparison—the 7:30 network programs of 1970 (even though there have been some general changes in the networks' approach to prime-time programing since then), the 8 p.m. network programs of today (even though the audience then is larger overall than it is at 7:30, and less "mixed", and the networks do not have any half-hour time limitation), or only the successful network programs of any year, disregarding the numerous failures, including some already this year. These are comparisons which are difficult to make. We see no need for it at this time, in view of our conclusion above that the rule has not yet had a fair test as to its potential.

95. "*Number of producers represented in access time.*" As mentioned in par. 32, above, the proponents and opponents of the rule differed sharply as to the comparative numbers of producers represented in access time (or total prime time) in 1970 before the rule and in 1972 under the rule. The difference was basically one of semantics; the number of producers of first-run syndicated material was greater in 1972, but it was less than the total number of producers represented in 1970, including network and "off-network" programs as well as first-run syndicated material. (If the producers of "off-network" programs included for 1970 were not counted, since this was not new material, the result might well be pretty much a standoff numerically between 1970 and 1972.) In view of our basic conclusion above that it is too early to evaluate the full potential of the rule, we need not at this point get into this question.

96. *Exclusion of network programing which would otherwise be presented.* This point was vigorously urged by various opponents of the rule, including the "majors", union and guild representatives, and independent producers who oppose the rule and are members of the

National Committee. The argument runs that the rule has produced nothing good in the way of programing, and at the same time, by lessening the amount of prime time available to the networks, has reduced the time they can devote to significant new programs, such as programs including members of, and of interest to, minority groups, situation comedies of particular interest to women, etc. It is said that this unfairly penalizes producers preferring the network route. In this respect also, we conclude that it is too early to make a judgment. There are various points to be noted. First, these independent producers are free to enter the non-network production activity whenever they wish to. Second, no conceivable change in the rule is going to permit all, or even a much larger part, of program ideas to gain network exposure. For instance, the major film producers in their latest filing (September 1973) claim that of 217 pilots presented to the networks for new program series in the last two years, only 33 became regular series and 24 were given partial exposure; the remainder, 160, got nothing. Adding 24 half-hours per week for the three networks might reduce this last figure to something in the order of 140, still nearly two-thirds. The third point is related to the same matter—if considerable amounts or prime time were given back to the networks, it is hard to say how they would fill it to the extent they decide to use it—with additional programs or largely to increase the length of existing shows. For example, NBC's announced program schedule for the January 1974 "new season" includes only 19 programs filling the 21 hours of prime time, with movies 5 nights per week. Thus, the result might be largely to add to the length of existing movies or other material, rather than to increase the number of programs. This is perhaps particularly true since two of the networks, ABC and NBC, do not support a change in the rule in this respect.[41]

97. "*Network dominance*". It was vigorously urged that the rule works to increase network control and dominance, rather than lessening it, by creating an artificial scarcity of prime time and strengthening the networks' control over what remains vis-a-vis advertisers and program suppliers. This must be regarded as somewhat speculative, in view of the strong degree of dominance inherent in the networks' position, as long as they are three sellers on the one hand, as against hundreds of potential national advertiser customers, and three buyers on the other hand facing more than 100 producer-sellers. By contrast, the reduction in control through removing 11 or 12 hours a week from "the network funnel" is definite and readily apparent. It is true that the role of the owned stations in the success of access-period material is considerable, but this appears to be somewhat less true now, when these stations are buying somewhat less as a group. We do not find in these

[41] A related argument advanced by some opponents of the rule is that only the networks have the resources or the fortitude to start a "different" or controversial program and to continue with it when it is not initially popular. We find this much too speculative to afford basis for modifying the rule beyond the increase in permissible prime time mentioned, in view of the uncertainty mentioned in the text, the fact that we cannot at this time evaluate the rule's full potential with respect to the programs which are likely to be offered and presented in the future (already discussed) and the problems which have often been presented in programing the 7:30–8 p.m. period, which is what is basically involved here.

considerations any reason, at this time, to act to relax the rule any more than indicated above.

98. "*Impact on Hollywood*" *and use of foreign material.* These two related lines of argument, vigorously urged by opponents of the rule such as union and guild groups and the major film producers, involve areas outside of the normal ambit of the Commission's expertise. Moreover, in some respects, such as the degree of protection from foreign competition which should be afforded, they involve questions of general national policy which are basically beyond our jurisdiction to decide. At this juncture, when there is not yet an adequate basis on which to evaluate the full potential of the rule in these respects as in others, we conclude that they do not afford a basis for any present relaxation of the regulation beyond that adopted herein.

99. Moreover, there are other uncertainties and complexities which make any evaluation difficult, particularly as to the "impact on Hollywood" question (see Appendix D). These include the lack of any real information as to how much the loss in Hollywood network-program production activity has or has not been "made up" by syndicated and local programing efforts, other factors affecting the situation, some of them of long standing (including increased network prime-time use of movies and "re-runs", each regarded by OTP as about equal in impact to the prime-time rule, and long-standing developments adversely affecting U.S. motion picture production), the substantial income accruing to Hollywood in recent years from the making of TV commercials, the extent to which any decline in film production activity and employment simply represents a changeover to videotape production which involves to some extent different unions, and the uncertainty mentioned above as to what kind of use the networks would make of any additional time. As to the use of foreign product, this is down slightly in 1973 compared to 1972, and it is not possible to tell how much it may be affected in the future by recent changes in international currency and trade relationships, as well as by possibly increased U.S. program production coming with greater certainty as to the rule.

100. "*Commercialization*" *and increased access to non-national advertisers.* These two considerations, mentioned in paragraph 32(4) above, are conflicting but difficult to weigh because they are quite different. We conclude that, bearing in mind that individual licensees may, and some do, limit the level of commercial activity in syndicated programs, these considerations are about equal pro and con.

C. Other matters

101. *News-public affairs and the* "*Wolper proposal.*" As mentioned previously, the rule adopted herein permits one of the six normally "cleared" 7:30 segments each week to be filled with network or off-network material of certain types, including public affairs and documentaries. One of the important reasons for this is to encourage the presentation of regular network prime-time public affairs or "news documentary" programing, which has recently declined considerably.[42]

[42] Providing for regular presentation of news and public affairs material will eliminate questions which have occurred in the past, as to when a "one-time" program becomes a regular series, for example a series of post-primary election analyses which, naturally, come on Tuesdays.

A second reason is to encourage the presentation of other kinds of network or off-network documentaries, such as those produced and discussed herein by Wolper.

102. The question for decision at this point is what *further* provision for such activities should be made, if any. As to news and public affairs, should we grant a blanket exemption, or continue the "one-time only" waiver for such material now in effect? Should there be any further exemption for other documentary material, as urged by Wolper?

103. With respect to documentaries generally, such as those involved in the "Wolper proposal", in our view the rule change adopted, permitting one of the six weekly "cleared" half-hours to be used for such material from the network or when it is off-network, is all that is warranted, consistent with the rule's objectives and the public interest. As to news documentaries and public-affairs programs, we have decided that the best way to deal with this is by liberalizing slightly the exemption now in the rule for "on the spot" coverage and fast-breaking news events, by adding the phrase "and related programing" to that subparagraph. This will make it clear that when an important event occurs, warranting unusual network coverage, that coverage need not consist only of on the spot material, but may include programing such as the CBS broadcasts in the evening of the death of former President Truman (interviews with him filmed some years ago).

104. It appears that the two modifications thus made—permitting regular network (or off-network) public affairs programs during one of the six weekly "cleared" half hours, and permitting coverage of important events to include "related" as well as actual on-the-spot coverage—will provide sufficient opportunity for the presentation of this important material. We are extending, until the effective date of the rule changes, the waiver granted to the networks for "one-time" news and public affairs programs. We do not now decide finally the question of whether this kind of waiver should be extended further into the future, but we are inclined to the view that with the liberalizations mentioned, and the availability of network prime time in quantity for this purpose, further waiver of this sort will not be appropriate.

105. *Political broadcasting.* This exemption to the rule was not discussed in the Notice, but was in some of the comments; see par. 65, above. We are adopting herein the request that the rule not be limited to political candidate uses, but may include any political broadcasting activity by or on behalf of a candidate or candidates. This will resolve questions such as the Connally-for-Nixon broadcast of 1972. We are not adopting, at least at this time, the NAITP suggestion that the exemption apply only where the network has not refused the candidate time during its regular network programing hours, as happened in 1972. It may be that there is merit in this suggestion, but we do not have enough information to evaluate it with assurance. With the next general election nearly three years away, there is enough time to consider this if it is raised again in the near future.

106. "*Off-network*" *programing.* As noted above, the 7 p.m. (E.T.) half-hour is freed from any restrictions, which means that if stations choose to do so, they may fill it with off-network programs. We are not

prepared to go further than this toward liberalizing the rule, for example abolishing this restriction altogether, which a number of parties urged. There is merit in the NAITP observation that such a course would simply mean curbing current network shows in favor of old network shows, with a corresponding decline in any new program production, either network or first-run syndicated. Considering the substantial impact on new material which this would have, it does not appear that it should seriously be considered.[43]

107. *Sports runovers.* The general rule structure adopted and discussed above makes somewhat easier the problem of dealing with straight late-afternoon "sports runover" situations, e.g., football games starting at 4 p.m. E.T. and usually, but not always, ending by 7. Since the 7–7:30 p.m. period is no longer subject to restrictions, this becomes less of a problem. However, if the objectives of the rule are to be properly served, we also believe it desirable to insure a higher degree of protection from impingement for the remaining portion of "cleared" time, the 7:30–8 p.m. E.T. period, than that which has prevailed up to now for the preceding half-hour. Accordingly, the formulation adopted in Appendix A is that sports runovers of late afternoon games will not be considered "network programing" if the game was scheduled so that in normal course the telecast (including post-game shows, if any) would have been over by 7 p.m. E.T. We realize that no rule will prevent *all* runovers—triple overtime basketball, 13-inning World Series games, an hour's weather delay in a golf tournament, etc.—but this should eliminate all but a very few of them. Since the networks have been following such scheduling arrangements in the past, this should present them with no difficulty.

108. *The "time zone difference" problem.* This subject, discussed in pars. 51–52 above, acquires a new aspect in light of our decision to tie the access period to a certain time of the evening, 7:30 p.m. E.T. and P.T. (6:30 p.m. C.T. and M.T.). This means that not only will these Western situations arise in connection with the *Academy Awards* program and similar events, which start at 10 p.m. E.T. and are preceded in the East by two hours of network programs; they will also occur with every evening network sports event originating in the East. For example, a World Series game starting at 8 and running until 11 E.T. (5 to 8 P.T.) will preempt the access period that evening for Mountain and Pacific time zone stations, and therefore the station will not be able to comply with the rule if it carries the game. These much more numerous situations have not been a problem under the present rule, since, when the network presents a sports event at 8 p.m. E.T., normally it presents no other network material that evening. But with the rule in its changed form, the situation will occur fairly often, for example with NBC's 15 or so regular Monday night baseball games (plus the All-Star game and up to three World Series evening games) and ABC's 13 or 14 Monday night NFL games, which start at 9 p.m. and are preceded in the East by one hour of network material. All told, taking into account "special events", the total could be as much as 25 times a year for a given station under present scheduling patterns.

[43] With the more liberal provisions adopted, it appears that it will no longer be necessary to consider further "off-network" waivers for particular programs, once the rule goes into effect. This *ad hoc* process presents some difficulties and dangers.

109. Clearly, it would not be in the public interest to forbid carriage of the games themselves. The question is whether stations doing so, during one of the access period 7:30 slots, should be required to "clear" a corresponding half-hour later that same evening. We conclude that this should not be required, as a matter of regulation; the rule as adopted states simply that these occurrences are not considered to be "network programing" for the purpose of Section 73.658(k). There are too many complexities to warrant the formulation of an iron-clad rule, including the desirability of permitting the presentation later in the evening of network news when it has been preempted by these events at its usual time, and some variations in network practices with respect to filling the time after the sports or other special event. However, in situations where the network does not present material for the West after the event, and where therefore these stations have considerable prime time at their disposal, we expect that some of it, at least, will be devoted to the type of material which it is the purpose of the rule to promote, local or first-run-syndicated programing.

110. "*Summer Olympics*" *situations and pre-game shows.* We are adopting herein the suggestion of the parties that when a network devotes all or substantially all of its prime time to a certain type of special programing, use of the additional half-hour between 7:30 and 8 for that purpose should also be permitted (the "Summer Olympics" type of situation, which all commenting parties agreed should have been the subject of waiver). The chief problem in this connection is what should be considered "special" programing, particularly as to evening sports events—fairly common, as noted above—and movies, e.g., a four-hour presentation such as *The Ten Commandments.* It left without limitation, it would be fairly easy for the networks to arrange their schedules so as to include such programing to an extent which would be an inordinate impingement on the availability of the access period to non-network sources. Likewise, it appears undesirable to attempt to define exactly all of the kinds of material, sports events, etc., which would warrant such treatment. Accordingly, we limit the exemption on this basis to: (1) international sports events (Summer and Winter Olympics, and perhaps some others such as Pan-American games, (2) New Year's Day bowl games (an established situation) and (3) other network programing of a "special" nature which is neither sports events nor motion pictures.

111. *Pre-game shows.* Some past waiver requests, chiefly by NBC in connection with the baseball All-Star game and the World Series, have involved the presentation of pre-game shows starting at 7:30, before the game itself starting at about 8. In our view, it is appropriate for the new rule to provide for such programing, but only to a very limited extent. It appears that the best way to approach the matter is simply to specify a number of times each year which each network and its affiliated stations will be permitted to present pre-game shows during "cleared" time periods, rather than attempting to list events which appear important enough to warrant this departure from the general rule. Five each broadcast year appears an appropriate number, which, in the case of NBC, would accommodate three evening World Series games plus the All-Star baseball game plus one other event.

112. *Changes in determination of top 50 markets.* We are not adopting herein certain suggestions advanced during the oral argument by the representative of one multiple owner (The Outlet Co., with stations in Orlando, Providence, San Antonio and Syracuse) concerning the determination of what are the top 50 markets each year. One suggestion was that our ranking should use ARB's "area of dominant influence" (ADI) figures and ranking, rather than "prime time households" as at present. The former was said to be the basis used by advertisers. The other was that the ranking, according to any given year's list, be effective further in the future rather than the next season; for example, our current list should be effective only at the beginning of the 1975–76 season. This would give stations additional lead time in planning when they come into the top 50 for the first time, and they would already know, when in, how long they will remain. The first point would make very little difference (one in terms of 1974–75 listings; Syracuse is out and Orlando-Daytona Beach back in under either). The second matter does not appear to represent a major problem, considering the small number of changes which occur each year (two between 1973–74 and 1974–75, with Syracuse and Toledo dropping out and Orlando-Daytona Beach and Salt Lake City re-entering). In view of the complexities which might be involved, and the fact that these suggestions were raised for the first time quite late in the proceeding, they are not appropriate for consideration here. These questions may be raised by separate petition for rule making if a party wishes to do so.

113. *Effective date.* We have concluded that essentially as far as the basic changes involved are concerned, the rule should be made effective as of the fall of 1974. In order to avoid the need for temporary readjustments lasting only a few weeks (which have been the subject of waiver requests in the past) we are providing, rather than October 1, an effective date of "the date between September 1 and October 1 which the station's primary network designates as the start of the fall season". Generally, this will be a Monday. Our reasons for picking a date some 8 months away—rather than the much longer time requested by CBS, or the more immediate effectiveness urged by the "majors"—are that this appears to be the most satisfactory resolution in light of all of the circumstances and the nature of the changes made. Clearly the public interest is served by making improvements in any rule effective at a reasonably early date, and we cannot agree with CBS that so much lead time is necessary in view of the limited expansion of network programing which we have decided to permit. On the other hand, we believe that an earlier date would create confusion and possibly work a hardship on some parties. The 8-month period thus allowed appears adequate for all parties to make plans and preparations in light of the fairly small changes which have been adopted. Pending the effectiveness of the amendments adopted herein, the present rule remains in effect and must be complied with.

114. In reaching this conclusion, we have considered a "Petition for Clarification" filed herein on December 14, 1973, after our November 29 Public Notice of instructions to the staff to prepare a document amending the rule essentially as set forth herein, by two of the most

vigorous supporters of the Rule, National Association of Independent Television Producers and Distributors (formerly NAITP), and Association of Independent Television Stations, Inc. This pleading, while initially asking that our public announcement be clarified by the specification of an effective date for the new rules (not mentioned therein), is chiefly devoted to argument that the date should be the beginning of the 1975–76 season, or about October 1, 1975. It is urged that the issuance of the public notice has created confusion and paralysis, both because of the uncertainty of the effective date and as to whether the rule adopted will be exactly the same as that outlined in the public notice. It is stated that affiliated stations are refusing to buy until they know for sure what they and their competitors will be able to carry and how much first-run syndicated product they will need; independent stations are similarly afraid to move because of uncertainty as to what they must program against on affiliated stations or even what programs will finally be available to them; and in both cases the weight of this paralysis falls on independent producers, who are thus unable to sell their material. It is argued that the only way to remove the uncertainty as to the coming season is to state clearly that the new rules will not become effective until fall 1975; otherwise, with the inevitability of petitions for reconsideration (and likely modifications at least in minor respects as a result thereof), and of court appeal lasting into 1975, there will be only an illusion of certainty if the Commission issues now a decision effective this fall, and it is virtually certain that a stay of an October 1974 date will occur, either from the Commission or from a reviewing Court. Meanwhile, however, considerable damage from the present uncertainty would have been done; therefore the Commission should recognize the realities and itself impose now a year's delay.[44]

115. It is also claimed that a fall 1974 effective date would in effect contribute chiefly to the use of cheaper off-network re-runs, since the networks have stated that they need greater lead time before increasing their programing (e.g., CBS urges the fall of 1975), and first-run syndication production efforts will be to some extent diminished by the uncertainty (further hurting production activity in a recession period) so that there will often be little choice except to use off-network material. Producers of new one-hour programs, it is said, are particularly affected. This would *inter alia*, hurt independent stations, by the siphoning of off-network material to their affiliate competitors and also by putting them in a second choice position as to scarce first-run product. These parties also urge that the Commission should follow the example of its earlier handling of the rule, making it applicable only some 17 months after its adoption (May 1970 to October 1971) and then giving an additional year for stations to run off-network material in the access-period. A greater grace period here is said to be *a fortiori*,

[44] No specific details in support of the general assertions are given, but it is stated that this is for reasons of confidentiality, and if requested NAITPD will supply information as to station nonrenewal or refusal to purchase, on a confidential basis.

since here it is a matter of re-runs replacing new material rather than *vice versa*. Lastly, the matter of equity is claimed—that many independent producers have in good faith prepared new material for syndication in this fall's season, and are suffering economic damage from the uncertainty. In sum, it is said, equity, the public interest and precedent all dictate and effective date no earlier than fall 1975.

116. We do not find in these arguments reason to delay the effective date of the rule changes longer than until this fall, whatever date in September 1974 the station's network selects as the start of its fall season. As mentioned above, the rule is in effect a restraint, whose maintenance to the full extent it now exists we cannot find to be justified. Therefore it is appropriate to lessen the restraint at the earliest date consistent with the need for reasonable advance planning. The period of some eight months from this decision should be sufficient for that purpose, or, for that matter, the period of roughly five months which should elapse between any decision on reconsideration and the effective date. Appeals to court may of course delay the ultimate finality of the decision, but in view of the compromise nature of the changes adopted, it is far from certain at this point who the appellants (if any) would be, or what kind of stay would be sought or would be appropriate if requested. In our view, any further delay on our part, if it should ultimately be appropriate, should be granted only after we have had a chance to consider the matters raised on reconsideration (which may, of course, raise this point as well as substantive matters). Moreover, as mentioned earlier, the changes adopted herein are basically not great. As to additional network programing, this may be only up to one hour on one night a week as far as the time the networks have used up to now is concerned. The other significant change here is the removal of restrictions on the 7–7:30 p.m. half-hour; but, as mentioned above, some 90% of stations subject to the rule devote this time Monday through Friday either to news or to stripped game-show programs most of which were in existence before the rule and shown in this time period to some extent. The petition states that the new rules will not provide any one-hour access slots; but in practical terms this is really a significant change only as to Saturdays (the networks all begin their Sunday programing at 7:30 E.T.). We adhere to the view expressed, that the reasonably prompt removal of the restraint involved is appropriate.

117. *Interim procedures pending effectiveness of the rule changes.* Pending the effectiveness of the new rules this fall, we contemplate that in general the administration of the rule should proceed as it has up to now, with generally the same treatment of waiver requests relating to operation during this interim period (often, these may be handled by staff action under the expanded delegation of authority to the Chief, Broadcast Bureau, which was effective November 13, 1973; see Sec. 0.281(b)(7) of the Rules). We note two areas in which requests have recently been made and in which waiver appears appropriate if similar requests are received in the future, particularly in light of our determination herein that the maintenance of strict re-

strictions on use of the 7 p.m. (E.T.) period is no longer appropriate.[45] These are:

(a) Sports runover waivers for network coverage of golf tournaments, where the coverage is scheduled to conclude by 7 p.m. E.T. but a tie and "sudden death" playoff, or weather delays, or a combination of both, may make it run later; and

(b) Permitting stations to carry network news at 7 p.m. E.T. or P.T. (6 p.m. C.T. or M.T.), without its counting toward the three hours of permissible network prime-time programs that evening, and without the requirement that it be preceded by a full hour of local news or public affairs programing, on evenings when the station's regular network news time during the previous hour is preempted for a sports or other special broadcast (network or non-network).

118. *Consideration of the rule in the future.* As noted above, many of the proponents of the rule urge that it needs some certainty in order to achieve its potential, and a number of them urge that the Commission give some assurance that the rule, as modified herein, will remain substantially *as is* for a number of years (two, three or five years are suggested).

119. While we recognize the desirability of certainty in this respect, it is very difficult for this or any other similar agency to give assurances of the sort requested. The Commissioners who have participated in the decision obviously cannot bind others who may be appointed in the future; nor is it necessarily appropriate to bind ourselves to a given course of action or non-action under any and all circumstances. However, certain facts are apparent. This proceeding has taken nearly 15 months to resolve from the date of the Notice, including two rounds of comments, later written submissions and two long days of oral argument, and intensive Commission consideration this past fall and early winter. With the very many other important, complex and pressing matters now before us, it is not anticipated that another look at the prime time access rule will be taken in the immediate future, nor that, if and when the matter does receive further consideration, resolution will be within a brief period from the commencement of the proceeding.

120. Authority for the rule changes adopted herein is contained in Sections 1, 2, 4(i), 301, 303 (b), (f), (g) and (i), and 313 of the Communications Act of 1934, as amended.

ORDER

121. In view of the foregoing, IT IS ORDERED, That:

(a) Effective September 1, 1974, Section 73.658(k) of the Com-

[45] We do not here pass on two other pending waiver requests, which might involve impingement on the availability of prime time to a larger extent: One is a petition for reconsideration of our deferral of waiver for the off-network program *Animal World*; the second is by a station for waiver to permit regular presentation of the ABC public-affairs program *The Reasoner Report*, during prime time on Saturdays, when followed (but not preceded) by a half-hour local public-affairs program. Decision on these will be forthcoming in the very near future.

mission's Rules, the prime time access rule, IS AMENDED, to read in its entirety as set forth in Appendix A hereto.

(b) The "Petition for Clarification" filed on December 14, 1973, by National Association of Independent Television Producers and Distributors and Association of Independent Television Stations, Inc. IS GRANTED to the extent that an effective date for the new rules is adopted, and in all other respects IS DENIED.

(c) The waiver exempting "one-time" network news and public affairs programs from the three-hour limitation now in Section 73.658(k), last granted in FCC 73–888 (released August 31, 1973) until a period 30 days after release of this decision, IS EXTENDED to the date in September 1974 which each network designates as the start of its new season.

(d) Petitions to correct the transcript of oral argument held July 30–31, 1973, filed by the following parties ARE GRANTED:

Boston Broadcasters, Inc.
National Association of Independent Television Producers
American Broadcasting Companies, Inc.
Westinghouse Broadcasting Company, Inc.
Goodson-Todman Productions
National Broadcasting Company, Inc.
Columbia Broadcasting System, Inc.

122. IT IS FURTHER ORDERED, That this proceeding, Docket 19622, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

Effective September 1, 1974, paragraph (k) of Section 73.658, the prime time access rule, is amended to read as follows:

§ 73.658 Affiliation agreements and network program practices.

* * * * * * *

(k) *Evening programming requirements.* The provisions of this paragraph apply to stations in the top-50 U.S. television markets (see NOTE below) which are regular affiliates of, or commonly owned with one of the three national television networks (as defined in paragraph (j) of this section), with respect to their evening programming starting on the date between September 1 and October 1, 1974, which their network designates as the start of its "new season".

(1) After such date in September 1974, each station shall devote not less than six (6) half-hours between 7:30 p.m. and 8:00 p.m. E.T. and P.T. (6:30 and 7:00 p.m. CT and MT) Monday through Saturday to programs which are not network, off-network or feature film; *Provided, however,* That:

(i) one (1) of these six (6) half-hours each week may consist of children's specials, documentaries or public affairs programming, either network originated or off-network.

(ii) "Documentary" programming means any program which is non-fictional and educational or informational, but not including programs where the information is used in a contest among participants.

(2) The following types of material are not considered "network programming" for purposes of this paragraph, so that they may be presented without limitation during the Monday-Saturday time periods mentioned in subparagraph (1) hereof:

(i) "Runovers" of sports events carried on the network during late afternoon or early evening hours, if the telecast of the event (and accompanying pre-game and post-game material, if any) is scheduled so that in the normal course it would be concluded by 7:00 p.m., ET.

(ii) For stations in the Mountain and Pacific time zones, the "live" broadcast of any "simultaneous" network programming, such as sports events or some other special events, which are broadcast simultaneously throughout the 48 contiguous states; provided the network's schedule for the evening including such telecasts complies with the provisions of this paragraph with respect to stations in the Eastern and Central time zones.

(iii) Telecasts of an international sports event such as the summer or winter Olympic games, New Year's Day college football games, or any other network programing of a "special" nature other than sports events or motion pictures, when the network devotes all of its time after 8 p.m. E.T. or P.T. (7 p.m. C.T. or M.T.) the same evening to the same programing, or all of it except brief incidental "fill" material.

(iv) "Pre-game shows" in connection with important sports events carried by the networks (e.g., the World Series), on no more than five occasions per broadcast year.

(v) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or programing related to such events, and political broadcasts by or on behalf of legally qualified candidates for public office.

(vi) Material carried on a commercial or other network other than the three national networks as defined in paragraph (j) of this section.

(3) For those portions of the Eastern and Central time zones where "daylight saving time" is not observed for part or all of the year, during the portion of the year when it is not observed, the times which must be "cleared" of network, off-network and other feature film material shall be one hour earlier than those specified in subparagraph (1) of this paragraph, except for stations which regularly delay network evening programs and rebroadcast them an hour later.

Note.—For the purpose of this paragraph, the "top 50 U.S. television markets" are the 50 largest markets, in terms of average prime-time households, listed each year by the American Research Bureau (ARB) in its publication *Television Market Analysis*. Shortly after this publication is issued, the Commission will issue a public notice setting forth the top 50 markets as indicated in that publication. This listing will apply for the following "broadcast year", that period of about twelve months starting the following September on a date which each network designates as the beginning of its "new season".

APPENDIX B

Parties Participating in the Proceeding by Filing Formal Material or Participating in Oral Argument

This Appendix lists the parties who participated formally in the Docket 19622 proceeding, either by formal filing of material or in oral argument. There are listed first those parties filing initial comments (with an indication of their later participation, if any), then the additional parties filing reply comments (with a similar indication as to later participation), and then those participating in the oral argument without having filed regular initial or reply comments. After the names of TV licensee parties (except the three national networks, and some other parties, such as certain major film producers, whose main interest in the proceeding did not appear to be as licensees), there are listed the cities in which their stations are located. "Ind." following the city indicates that the station is independent; otherwise it is network-affiliated.

In addition to the written material covered herein, a substantial number of letters and other informal submissions were received and have been included in the docket herein.

Name	Later participation		
	Reply comments March 1973	Oral argument July 1973	Written material after March 1973 [1]
I PARTIES FILING FORMAL INITIAL COMMENTS THROUGH ABOUT JAN. 15, 1973			
Networks:			
American Broadcasting Cos., Inc. (ABC)	×	×	×
Columbia Broadcasting System Inc., (CBS)		×	
National Broadcasting Co. Inc., (NBC)	×	×	
Associations:			
National Association of Independent Television Producers (NAITP).	×	×	×
Association of Independent TV Stations, Inc	×	×	
ABC Television Affiliates Association			
CBS Television Affiliates Association	×	×	
Licensees [2] who are also program suppliers:			
Metromedia, Inc. (Cincinnati, Kansas City, Minneapolis-St. Paul, Los Angeles, New York, Washington, all ind. except Kansas City) and Metromedia Producers Corp.	×	×	
Westinghouse Broadcasting Co., Inc. (Baltimore, Boston, Philadelphia, Pittsburgh, San Francisco).	×	×	
Other TV licensees:			
Boston Broadcasters, Inc. (Boston)		×	
Broadcast-Plaza, Inc. (Hartford)			
Corinthian Broadcasting Corp. (Fort Wayne, Houston Indianapolis, Sacramento, Tulsa).			
Fisher's Blend Station, Inc. (Seattle)			×
General Electric Broadcasting Co., Inc. (Denver, Nashville, Schenectady-Albany-Troy).	×		
Gross Telecasting, Inc. (Lansing, Mich., La Crosse, Wis.)			
KOOL Radio-TV, Inc. (Phoenix)			
Newhouse Broadcasting Corp. (Birmingham, Harrisburg St. Louis, Syracuse plus satellite, 50 percent of Portland, Oreg.).			
Palmer Broadcasting Co. (Des Moines and Davenport, Iowa).			
Peninsula Broadcasting Corp. (Hampton-Norfolk, Va.)			×
Southern Minnesota Broadcasting Co. (Rochester, Minn.)			
Time-Life Broadcast, Inc. (Grand Rapids)			
Turner Communications Corp. (Atlanta ind)			
WBRE-TV, Inc. (Wilkes-Barre/Scranton)		×	
WHTN-TV, Inc. (Huntington-Charleston, W. Va.)			
Seven licensees joining in "summary comments" [3]			
Major film producers:			
MCA, Inc	×	×	×
Paramount Pictures Corp			×
Screen Gems Division of Columbia Pictures, Inc	×	×	×
Twentieth Century-Fox Television		×	×
Warner Bros., Inc	×	×	×
Other program producers and syndicators:			
Firestone Program Syndication Co			
The Fremantle Corp			
Goodson-Todman Productions		×	
QM Productions			
Samuel Goldwyn Productions [4]			
The Wolper Organization, Inc	×	×	
Wrather Corp			
Union, guild and actor agency groups:			
Screen Actors Guild, Hollywood AFL: Film Council, Writers Guild of America West and Composers and Lyricists Guild (joint comments)		×	
Independent Casting Television			
Other: American Civil Liberties Union		×	
II ADDITIONAL PARTIES FILING FORMAL REPLY COMMENTS			
Major film producers: Metro-Goldwyn-Mayer, Inc. and United Artists Corp. (joint comments)	×(MGM) [5]		
Other program producers:			
Daniel Wilson Productions			
Ronox Productions, Inc			

See footnotes at end of table.

Name	Later participation		
	Reply comments March 1973	Oral argument July 1973	Written material after March 1973 [1]
III ADDITIONAL PARTIES PARTICIPATING IN ORAL ARGUMENT			
Network: Hughes Sports Network, Inc.			
Association: National Committee of Independent Television Producers and member producers Bud Yorkin and Lee Rich.		X	
TV licensees:			
Post-Newsweek Stations, Inc. (Washington, Miami, Jacksonville).			
The Outlet Co. (Orlando-Daytona Beach, Providence, San Antonio, Syracuse).			
Wometco Enterprises, Inc. (Miami)			
Program producers and syndicators:			
Phillips Productions, Inc. (Joseph Cates, NAITP member)			
Youngstreet Productions (Nick Vanoff, NAITP member)			
Tomorrow Entertainment, Inc.			
Viacom International, Inc.		X	
Worldvision Enterprises, Inc.		X	
Union and guild groups: [6]			
Film and Television Coordinating Committee			
National Conference of Motion Picture and Television Unions.			
Other parties:			
Action for Children's Television			
Adam Young, Inc.			
Dr. Bernard Gifford (of New York City-Rand Institute, but appearing for himself).			
Clarence Jones, Amsterdam Evening News			
Cleveland Amory			
National Citizens Committee for Broadcasting			
Paul Kline, Computer Television, Inc.			
Robert R. Nathan Associates, Inc.			

[1] The later written material covered herein does not include various pleadings directed to the July 1973 oral argument, material submitted during oral argument by some of the participating parties, nor material filed later by the three networks concerning their own production activities and use of their production facilities.

[2] Parent and subsidiary companies are counted as one "licensee". The listing of cities where these parties have stations includes only those stations and cities mentioned in the comments.

[3] Chronicle Broadcasting Co., Clay Broadcasting Corp., Griffin Television, Inc., Leake TV, Inc., Rust Craft Broadcasting of New York, Inc., Screen Gems Stations, Inc. and WBEN, Inc., with stations in San Francisco, Wilmington (North Carolina), Wichita Falls (Texas), Oklahoma City, Little Rock, Tulsa, Rochester (New York), New Orleans, Salt Lake City and Buffalo.

[4] This party's comments related to its position as a lessor of production facilities.

[5] MGM did not actually participate in the oral argument because of illness, but a statement by its executive vice-president was read into the transcript.

[6] The 4 spokesmen for the Film and Television Coordinating Committee also represented union groups which had filed comments earlier. The National Conference of Motion Picture and Television Unions, which includes 5 unions and is concerned with national rather than local Hollywood-area matters, was represented by 4 spokesmen, its coordinator and officials of three of the component unions, IATSE, IBEW and NABET.

APPENDIX C

Material in the Comments and Oral Argument Concerning Access-Period Programing

This Appendix contains data from the comments and other filings in Docket 19622 concerning access period, and to some extent other prime-time programing, as well as some Commission staff analyses on various subjects.

Pages 1 and 2 are taken from the "Further Supplemental Joint Appendix" filed by the major film producers in September 1973, which contains new data for 1973–74 in addition to material from their earlier "Joint Appendix" for prior years. These filings have not been questioned as to their accuracy, although some of the proponents of the rule strongly objected to some of the assumptions and methods used, such as emphasizing time devoted to various programs rather than the programs as such, including the 7–7:30 period as well as the later half-hour which is the actual network cutback, and allegedly misleading use of percentages of "access entertainment programing" rather than of total access time (the latter would be about a third lower). The Commission staff has checked

the data and finds that it is at least reasonably accurate, and it is much the most complete of any of the showings submitted.[1]

The two tables are presented for the figures contained, not for the material at the top, particularly on Table II, which is the "majors" own comment on the figures, with which we do not necessarily agree.

This table analyzes, by broad type, those programs scheduled in the 3rd year—'73–'74—of the prime time access rule. Prior to the rule, network entertainment programming occupied 1137 half-hours, or 54.1%, of "access time."

For '73–'74, syndicated entertainment programming occupies 1382 half-hours or 66.8% of the total. News, local-interest programs, and movies are scheduled in the balance of "access time."

TABLE 1.—*Total access programing by type 1973–74* [1]

	Number of half-hours	Percent
1970–71 season before rule (network programing)	(1,137)	(54.1)
1973–74 season:		
Entertainment	1,382	66.8
(Top 23 entertainment programs)	(1,132)	(54.7)
News (local and network)	475	23.0
Local interest (nonnews)	145	7.0
Movies	66	3.2
Total access programing	2,068	100.0

[1] For 1970–71 (before the rule) and 1972–73, the corresponding data in the majors' "joint appendix" is as follows (half-hours): 1970–71: entertainment 1537 (network 1137, off-network 268, made for syndication 132), news (local and network) 457, local sports and other 44, movies 62. 1972–73: entertainment (syndicated) 1383, total news 488, total local interest 135 (including 5 "black interest"), movies 94.

This table analyzes program *types*, before and since the rule.

For '73–'74, the third year since the rule began, the average viewer will again have a very narrow choice of entertainment programming. About *55%* of all entertainment half-hours are *game* shows, a fivefold increase from *11%* in the year before the rule. Meanwhile, those entertainment programs with the highest degree of social relevance—comedies (like "Sanford & Son," etc.) have declined from almost *22%* to under *7%*; and *dramas* ("The Waltons," etc.) have declined from over *46%* to under *12%*. In addition, as prior filings indicated, the majority of even that small amount of drama in access is produced abroad, with minimal social content relevant to American life.

TABLE 2.—*4-year comparison of entertainment programs, by type*

	1973–74		1972–73		1971–72		1970–71	
	Number of half-hours	Percent	Number of half-hours	Percent	Number of half-hours	Percent	Number of half-hours	Percent
Game	758	54.8	672	48.6	294	22.8	170	11.1
Drama	160	11.6	228	16.5	357	27.7	712	46.3
Variety	194	14.0	255	18.4	225	17.5	265	17.2
Nature/travel	146	10.6	98	7.1	81	6.3	36	2.3
Cartoon	25	1.8	59	4.3	2	.2		
Comedy	91	6.6	24	1.7	242	18.8	334	21.7
Miscellaneous	8	.6	47	3.4	86	6.7	20	1.3

[1] If there are errors, they are not necessarily in favor of the majors' position. For example, while the majors argue that local programing has increased little under the rule, their figure of 135 half-hours in 1972–73 is among the highest of the commenting parties.

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USE OF FOREIGN-PRODUCED MATERIAL

The "majors", and other opponents of the rule, emphasize the extent to which foreign-produced material is used in access time under the rule. This rose from practically none in 1970–71 (before the rule) to 281 half-hours in 1972–73 entirely foreign-produced (20.3% of access-period entertainment program time), of which 244 half-hours were "off-foreign network". The increase was particularly notable in dramatic programing, 74.2% of which in 1972–73 (in terms of time devoted to it) was of foreign origin (*Police Surgeon, The Protectors, Evil Touch*, etc.). This percentage is probably even higher in 1973–74, with the demise of the *Young Dr. Kildare* program.

However, overall, it appears that foreign-produced material has declined somewhat in 1973–74, with only 197 of station half-hours devoted to "off-foreign network" programs, compared to 244 half-hours in 1972–73. Also, the networks have used foreign material in prime time in the past (Metromedia refers to 16 examples) and still do; there was mention in the oral argument of 7 such situations (although most of these were specials rather than regular weekly series).

USE OF "NETWORK RE-TREADS"

The majors et al also refer to the great bulk of syndicated access-period programing as "network retreads". While this term is used too broadly to be truly meaningful as such (since practically all entertainment programing is to some degree "derived" from something earlier), nonetheless a great deal of material is revivals or continuations of foreign network series, or, in the case of some successful game shows such as *Let's Make a Deal, The Price is Right* and *Hollywood Squares*, "sixth episodes" of programs currently stripped on the networks on weekdays. Of the top 25 access-period programs in 1972–73 in terms of station time devoted to them, 6 were foreign produced, three were "sixth episodes" of daytime network game shows, and 12 were continuations or revivals of former network series (*Kildare, Lassie, Wild Kingdom, Lawrence Welk, Hee Haw, Merv Griffin* and six game shows, 4 of them generally stripped). The other four—*George Kirby, Mouse Factory, Parent Game* and *Wait Till Your Father Gets Home*—have less specific origins in former network shows. The top 23 programs in 1973–74 include 13 of the above and 10 new ones; of the 10 new entries, 3 are foreign, 3 are present or recent daytime network game shows, and four have less specific antecedents (the latter are *Dusty's Trail, Ozzie's Girls, Bowling for Dollars* and *Wild, Wild World of Animals.*[2]

LOCAL PROGRAMING

As to the amount of local programing on top-50-market affiliated stations during the one-hour access period, the majors' Joint Appendix showed, for a week in the fall of 1972, a total of 130 half-hours of local material of a general nature other than news and movies (sports, etc.), plus 5 half-hours of "Black interest" material, programs identifiable as such by their title (this is probably an understatement). The first figure is a considerable increase from 44 half-hours in a similar week in 1970, but a decrease from 164 half-hours in a week in the fall of 1971. The "Black interest" figure is an increase from nothing in 1970 and three half-hours in 1971. The 1973 figure is 145 half-hours total (no breakdown as to "Black interest").

ABC and CBS also gave overall figures for a week in the fall of 1972, though not for earlier years. ABC gave figures for the *total amount of local news and public affairs programs* on the top-50-market affiliated stations during the 7:30–

[2] In setting forth these figures, we recognize of course the argument of the proponents that the public interest is served by the operation of the rule in permitting the continuation of programs, such as *Lawrence Welk*, which are quite popular even though their demography no longer fits the network's ideas at a particular time and therefore the network cancels the program.

8 p.m. (E.T.) time period except Sunday 10:30–11 p.m. E.T. for CBS and NBC affiliates—118 half-hours.

The figures showed considerable variation among markets. Boston and Houston showed 11, Dallas-Ft. Worth 9, Chicago, Miami, Sacramento and San Antonio 6, and Milwaukee and Oklahoma City 5. All of these except Boston represent largely the fact that one or more stations in the market have lengthened their local newscasts to an hour; in Boston, the programing is of a more variegated nature, with WCVB in 1972 presenting a different local program each day at 7:30 p.m.

At the other end of the scale, ABC's figures showed no local news or public affairs programs on affiliated stations (during this half-hour) in 11 markets, and only one half-hour in 15 markets, the latter including New York and Los Angeles.

The CBS showing was based on the same 7:30–8 p.m. (E.T.) period, plus a half-hour additional on Sundays, for a week in the fall of 1972. It showed that of 1,190 station half-hours, 149 (12.5%) were devoted to local programs other than public affairs (sports, entertainment, discussion and movies), and 111 to news and public affairs (9.3% of the total hours).

A few other licensees parties made showings as to the access-period programing in their markets, local and otherwise. Westinghouse, for example, showed that in roughly the same time period analyzed by CBS (above), in the 5 markets where it has stations there was a total of 32 local programs on affiliated stations during a week in October 1972 (including 4 regular newscasts but not including movies). These included 13 in Boston, 6 in San Francisco, 5 in Baltimore and 4 in Philadelphia and Pittsburgh. Thirteen of the 32 programs were on Westinghouse stations.

At the oral argument, an official of Viacom International, Inc., one of the proponents of the rule, stated and presented an exhibit showing that as of fall 1973, local programing would be presented during the access period in 44 of the top-50-markets, on 78 stations subject to the rule.

USE OF "STRIPPED" MATERIAL AND OTHER "BLOCK" PROGRAMING ON WEEKDAYS IN 46 OF THE TOP 50 MARKETS, 1970, 1972, 1973[8]

The following are the figures as to use of "stripped" game shows and other material during the first and second half-hours of prime time, Mondays through Fridays, for weeks in November 1970, November 1972, and October 1973. The news "blocks" mentioned were presented on all five nights; the movie program on ABC stations in Los Angeles and San Francisco ran on four nights (Monday in these weeks was ABC's Monday night NFL game). The other "stripped" material ran usually on five nights, although in up to about a dozen cases per year the station presented a different program on one night, and in one 1973 case two nights.

7–7:30 p.m. E.T. and P.T., 6–6:30 p.m. C.T.:

1970: 20 game shows, 33 off-network programs (mostly comedy such as *Petticoat Junction*, *I Love Lucy* or *Dick van Dyke* show strips, and some drama such as *Dragnet*), 47 local news, 26 network news, 3 local movie blocks, 1 syndicated (*Death Valley Days*). Total: 130. Nine stations presented "variegated" programing, basically a different program every night.

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[8] The 46 markets include all of the 1973–74 top 50 markets except Denver, Phoenix, Greensboro-Winston-Salem-High Point and Wilkes-Barre-Scranton. The first two are excluded because of their Mountain time zone location, where schedules in 1970 before the rule, and to some extent later, are more irregular than elsewhere, so that analyzing a particular half-hour is less meaningful. The last two are excluded because they were not in the top 50 in 1972–73, so there is no basis for comparison. The UHF station in the Grand Rapids-Kalamazoo-Battle Creek market, not yet on the air in 1970, is not included in any of the years. Included are four stations in the Hartford-New Haven market, where two UHF stations are affiliated with NBC. *Source:* ARB audience survey listings for November 1970 and November 1972 (particularly the second week of each year); and for 1973, *TV Guide* for the week of October 6–12.

1972: 51 game shows, 43 local news, 22 network news, 4 other,[4] 3 movie blocks. Total: 123. 16 stations presented "variegated" programing.

1973: 56 game shows, 45 local news, 21 network news, 2 other, 3 local movie blocks. Total: 127. 12 stations presented "variegated" material.

7:30–8 p.m. E.T. and P.T., 6:30–7 p.m. C.T.:

1970: All network (except for a few isolated preemptions) and thus "variegated" programing.

1972: 33 game shows, 7 local news, 3 other, 3 local movie blocks. Total 46

1973: 34 game shows, 11 local news, 2 other, 3 local movie blocks. Total 50

In 1973, in four markets all three affiliated stations were stripping game shows opposite the others in one of the half-hours; in two other markets, there were two stripped game shows opposite each other on affiliated stations in both half-hours; and in 17 other markets there were two game shows on affiliated stations at the same time (*Source:* Further Supplemental Joint Appendix of the major film producers).

USE OF "FEATURE FILM" DURING THE ACCESS PERIOD

In 1973, three top-50-market affiliated stations present local movies on five weeknights, from 6:30 to 8. These are ABC's owned station in Los Angeles and San Francisco, and a station in Hampton-Norfolk, Va. The latter also presents a movie during the access period on Sunday. In 1970, the ABC-owned stations also presented movies on weeknights, but from 6 to 7:30; the Virginia station has programed in this fashion only since the rule.

Another 15 top-50-market affiliated stations present local movies one night a week (or in one case two) during "access-period" hours (including a few late Sunday night). This does not include two which present them ending at 7:30.

USE OF SYNDICATED MATERIAL BY "O & O" GROUPS

One of the arguments urged by opponents of the rule is that it has not diminished network control and dominance, for one reason because of the vital role the three 5-station groups of network-owned stations play in the success or failure of a syndicated program. It is appropriate to inquire into the extent the stations, in these three groups, actually program their access periods with the same material as other stations in the same group. Set forth below is data for 1972–73 and 1973–74, using ARB rating survey program listings (for the second week in November 1972) for the first, and *TV Guide*, week of October 6–12, 1973, for the second. As can be seen, the stations in each group do use the same material to a considerable extent, though never entirely so and somewhat less in 1973 than in 1972.

ABC—1972: the five ABC-owned stations in the 1972 week presented a total of 24 access-period programs on the 5 stations, representing 12 different programs (one shown on two stations, was one hour; the rest were half-hour).[5]

Two programs were shown on all 5 stations, one on four, one on two, and 8 on one station only. Thus, of the 24 station program units, 42% were devoted to programs shown on all stations, 67% devoted to programs shown on two or more stations, and 33% to single-station programs. In terms of separate programs, 8 to 12 were used on one station and 4 on more than one.

1973: The 5 stations in the 1973 week showed a total of 23 access-period syndicated programs, including 14 separate programs. One was shown on all 5 stations

[4] "Other" programing is in most cases the *Merv Griffin* 90-minute talk show, shown in three markets in 1972 and two in 1973, but which at the oral argument was described by an official of Metromedia (which handles it) as not basically an access-period program. The remainder of this category consisted in 1972 of a 7 p.m. block on a San Francisco station listed as "Wide Wonderful World", which may actually be variegated "outdoor" material rather than a strip; and in 1972 and 1973, half-hour "film" programing at 7:30 on one of the two NBC affiliates in the Hartford-New Haven market.

[5] In the case of ABC's Los Angeles and San Francisco stations, there is included here the non-network material they present on Mondays following the ABC NFL football game which preempts the usual access-period time. In both cities for both years, this was the *Department S* syndicated program.

one on three, three on two and 9 on one station only. Of the 23 station program units, 61% were programs shown on multiple stations, 39% were shown on one station only. Of the 14 separate programs, only 5 were used on multiple stations, and 9 on one only.

CBS—1972: The 5 CBS stations showed a total of 35 syndicated programs in the access period, including 10 separate programs (one one-hour, the rest half-hour). Five programs were shown on all 5 stations, two on three stations, one on two, and two on one only. Thus, 71% of the 35 station program units were material shown on all stations, 94% of it was material shown on two or more stations, and only about 6% was material shown on only one station. Of the 10 programs, 8 were shown on two or more stations.

1973: The 5 stations presented, in the 1973 week, a total of 30 syndicated access-period programs, including 13 separate programs. None were shown on all 5 stations, 3 appeared on 4 stations, 3 on three stations, 2 on two stations, and 5 on only one station. Thus, 83% of the station program units were material shown on multiple stations, and 17% was material shown on one station only; of the different programs, 8 were used on multiple stations and 5 on one only.

NBC—1972: NBC has been the most nearly monolithic of the owned-station groups in this respect. In 1972, of a total of 38 syndicated programs presented during the week on the 5 owned stations, 35 represented 7 programs which were on all 5 stations, or over 90%; one program was on two stations and one on one station.

1973: There was a somewhat greater difference among these stations in 1973. The 29 syndicated access-period programs presented during the week on the 5 stations included 8 programs, five on all 5 stations, one on two and two on one only.[8] Thus, some 86% of the station program units were material shown on all 5 stations, and only about 7% was material shown on only one station. Six of the 8 programs were shown on more than one station.

APPENDIX D

Summary of Certain Factual Data and Specific Arguments

This Appendix summarizes factual data and specific arguments relating to two subjects. Most of it concerns material submitted in comments; paragraphs 11 and 33–37 relate to material presented at the oral argument, which differs in some respects from that in the comments.

A. Effect on U.S. Program Production and Employment in It

1. One of the arguments vigorously urged against the rule, and for its repeal, is the asserted serious adverse impact on U.S. program production and employment in it, which is generally put in terms of impact on "Hollywood". The chief parties advancing this argument are the "majors" and the Screen Actors Guild and other labor-guild organizations filing jointly ("SAG et al"); other parties urging the point are Samuel Goldwyn Productions and Independent Casting.

2. These parties assert that the network cutback resulting from the rule has meant a loss in Hollywood production activity of nearly $60 million annually, computed on the basis of slightly over $100,000 production cost per half-hour episode, times 24 episodes per series per year on the average, times 24 half-hours of network programs lost (4 hours per week per network).[1] SAG et al, using a

[8] These 29 program units occupied 39 half-hours of time, including the one-hour *Starlost* program and two half-hours of *Hollywood Squares*, both in all 5 markets.

[1] The actual amount of the network "cutback" per week resulting from the rule is either 22 or 24 half-hours a week, depending on what period is chosen as a basis for comparison. In November 1970—a period chosen by most commenting parties for comparability with fall 1972 data—all three networks programmed beginning at 7:30 E.T. 6 nights a week and at 7 p.m. on Sunday, and ran until 11 p.m., 24 half-hours more than they may under the rule. However, early in 1971 ABC cut its Sunday programing back to 8 p.m. so that, immediately prior to the rule, the three networks presented 22 half-hours more than permitted under the rule.

similar but slightly different basis of computation, put the annual figure at $63 million with $53,550,000 of it being payroll ($106,250 average payroll per episode), representing 16,128 production jobs or 3,570 full time jobs. Either explicitly urged or implicit in these arguments is the position that this loss is not made up to any significant extent by the access-period programing which has resulted under the rule. It is said that this is because this material is very largely either "game shows", involving little production activity and often made on an assembly line basis (and not employing actors in any event), or material produced abroad and thus not helping those actually working in U.S. production (although some American producers are involved and may benefit).

3. SAG et al advance statistics from labor sources as to the assertedly very bad unemployment situation in Hollywood resulting from the rule, the "rerun" situation and other industry problems, both TV and motion picture. As of November 1972, this includes figures for some 20 unions and guilds (including SAG but not AFTRA, which represents actors in tape productions), totalling more than 58,000 employees. The unemployment rates range from 7.4% (film editors, 1,739 total members) to 85% (actors, much the largest of these groups with over 25,000 total members). Other groups of over 1,000 members, and the unemployment rate, included property men (1,884, 23%), studio teamsters (1,087, 39.2%) screen extras (2,645, 75%), and writers (3,000 members, 73%). Percentages for two other groups over 1,000 (musicians 16,000 and directors 1,100) were not known. SAG et al claim that considering that November is the height of the production season, these figures are shocking, and they are even worse during the re-run season.

4. Other parties mention additional data. According to Screen Gems, the decline in production activity represents a loss of 3,800,000 hours of craft-union, "below the line" employment (statistics from the Motion Picture Health and Welfare Fund, showing 31,851,033 such employment hours in 1969–70 compared to 28,021,-721 in 1971–72, the earlier figure representing a decline of some 5,000,000 hours compared to the mid-1960's). The "majors" also give figures as to the decline in production of filmed entertainment TV programs over the last decade—755 hours and 1,471 half-hours in 1971 compared to 1,530 hours and 3,060 half-hours in 1962,) and a reduction in such material during the access period from 898 hours in 1970–71 to 81 hours in 1971–72. However, as ABC points out in supplemental comments (mentioned below), this excludes the large and increasing amount of videotape programming, both network and non-network, including such successful network programs as *All in the Family, Maude* and *Sanford and Son.* Samuel Goldwyn Productions, which is a production company and also a supplier of studio facilities to independent producers (mostly for network programs) claims a 25% decline in filmed production activities at its facilities—said to result from the preponderance of inexpensive programs using tape, or foreign material. It is claimed that this has hurt it and similar companies, and employment.

5. The proponents of the rule—particularly NAITP, ABC and Metromedia—urge a number of contentions in rebuttal to such arguments: (1) this is really not an appropriate concern in this proceeding; television is not chargeable with the health of Hollywood, the Commission was not concerned about this when it gave "off-network" waivers particularly for the foreign *Six Wives of Henry VIII* program, and in its comments in Docket 19554, the Justice Department expressed the view that the Commission's authority to consider unemployment or under-employment in Hollywood is "not clear". (2) this whole argument about "impact on Hollywood" is a myth; there is bound to be more employment with nearly 70 syndicated access-period programs now compared to 21 network programs during these earlier hours as well as increased local programming activity (NAITP uses the figures 4,620 episode-jobs compared to 1,386, on the basis of SAG's formula of 66 persons per episode, assuming the same new-repeat ratios); (3) these syndicated programs have a higher new-repeat ratio than network shows, particularly game shows (1153 of 1560 episodes of 10 game shows are new), so that using the same formula, game shows represent 76,098 episode-jobs compared to 792 for Wild Kingdom's 12 new episodes (or 24,864 if it presented the same number of programs); (4) production everywhere in the U.S. must be taken into account, including both syndicated shows made outside Hollywood, and local productions, and the Commission should also look at the quality of employment—youth, minorities, women, etc.—in which the independent producers are better; (5) Hollywood's "crisis" has been overstated, since conditions have improved since about mid-1971, with movie box-office receipts up in 1972 compared to 1971

(20% in gross receipts, 16% in number of admissions), more of the "majors" showing profits and their overall income picture improved by more than $100 million in 1971 over 1970, feature film "starts" up 32% and U.S. "starts" on foreign locations down 17%, and unemployment down in the fall of 1972 compared to a year earlier;[2] (6) to the extent there still is "depression" in Hollywood from this cause, it represents basically the decisions of the "majors" not to come into access-period production on a non-network basis, which they are free to do and doubtless will soon do if the rule is affirmed; (7) the whole matter is a highly complex one, involving this factor to some extent but also re-runs, increased use of movies (Metromedia claims that in a February 1973 week, 16 prime network hours were devoted to made-for-theatre movies reflecting no TV production activity); "runaway production", declining box-office receipts, and obsolete production and business practices—many of which factors reflect the basic problem which is high and increasing production costs, which have just about doubled in the last 10 years and are in part a union-caused problem; (8) the practice of foreign importation is by no means confined to access-period material, since the networks have done it on a number of occasions (Metromedia lists 16 in the last several seasons) and about 10% of prime time network schedules is devoted to foreign-produced movies; and, of course, the "majors", with 95% of their production away from Hollywood, are poor parties to urge this point.

6. *Material in NAITP and ABC Supplemental Comments* (July 1973). As permitted under the Notice of Oral Argument herein, NAITP and ABC filed supplemental comments discussing this subject at some length. NAITP's additional material is largely in the nature of legal argument disputing the relevance of this whole subject; it is asserted that it would be permissible for consideration only if it were shown that program output had declined under the rule, which obviously it has not. Absent that consideration, the matter is not appropriate for Commission evaluation. NAITP claims that since prime-time program output has increased under the rule, what those who raise this issue are really urging is that Hollywood employment be increased at the expense of an increased supply of programs—clearly inadmissible from the Commission's standpoint.

7. ABC likewise raises the relevancy question, but goes into more detail factually. It is claimed that basically, any assumption that unemployment in Hollywood is caused by the rule, and should be grounds for repealing it, is much too simplistic, in ignoring: (1) effect on employment elsewhere in the U.S., concentrating only on Hollywood, which means generally the "majors" who have not chosen so far to be active under the rule; (2) it ignores other developments in the industry, such as those relating to feature film and the substantial income from TV commercials. ABC claims that while the rule has led to different types of programs, and thus employment shifts as compared to the standard dramatic fare which makes up the bulk of network prime-time material, this does not necessarily mean fewer people. Thus, a game show typically means less employment than a dramatic show, but a variety show such as *Lawrence Welk* probably means more, with the large number of musicians, even though, like the game show, it does not represent much income to Screen Actors Guild or Writers Guild members. Also, it is claimed that those advancing this issue tend to ignore completely the increase in employment resulting from more *local* access-period programming, for example the 14 people added to the staff of ABC's Chicago station to handle its additional five weekly half-hours of news and public affairs material. In short, ABC believes that overall, U.S. employment under the rule has increased. ABC claims that any analysis of this situation must take into account three factors: (1) extensive union "featherbedding" in the industry, which has increased production costs greatly; (2) the increased use of videotape rather than film, which renders some statistics such as those mentioned above of no value; and (3) the rising income from TV commercials (see the discussion of OTP

[2] ABC presents figures based on California State unemployment insurance records, showing unemployment declines for all craft and guild categories shown except directors. The figures given are numerically considerably smaller than those shown by SAG et al, for example including only 721 unemployed actors in October 1972, whereas SAG's 85% of 25,000 would be over 20,000. Some of the opponents claim in reply that this is factually ridiculous, based only on claims during a two-week period, and ignores those whose benefits had expired by late 1972, or who, unable to get work, left the industry. NAITP also urges generally that the rule serves as a "shot in the arm" to independent production activity, and will benefit employment by forcing abandonment of archaic practices.

Report material, below).[3] In sum, ABC urges that, as happens from time to time in many industries, the source of the programs (majors v. independents) and the location of production have changed somewhat, but overall employment has increased rather than lessened, and the Commission should not act simply to preserve for the "majors" a position which they can no longer justify, just as Southern California's other major industry, aerospace, is going to have to adjust with the times.

8. ABC claims also that relief is not necessary because the majors—having cut their payrolls and film budgets, and otherwise reformed their inefficient practices—are now doing rather well (citing a *Business Week* article of June 1973 and other material). The number of planned motion picture "starts" in January and February 1973 was 32, nearly double the 1972 figure with 12 to be produced in Hollywood. MCA-Universal will have 13½ hours a week of network prime time this year. "Runaway production" is down, with 91 produced-in-U.S. movies in 1972 and 130 or so planned for 1973, compared to fewer than 75 in the 1969–71 period (resulting partially from devaluation). ABC also refers to a trade press article concerning the highly-regarded *Black Beauty* series, in which the producer ascribes his success to the absence of American padded costs. It is claimed that the rise of independent production may have spurred the "majors" to more efficient and more effective efforts.

9. *Material in the OTP Report (March 1973).* In March 1973 the Office of Telecommunications Policy published its "Analysis of the Causes and Effects of Increases in Same-Year Reruns Programming and Related Issues in Prime Time Network Television". This report related primarily to the "re-run" question, but contained some analysis relating to the prime time access rule. It was concluded that the rule was one factor leading to increased unemployment in the program production industry, along with re-runs, increased network use of movies, declining theatre admissions and "runaway production". However, it should also be noted that this study covered only the period ending with the 1971–72 year, the first under the rule, when use of "off-network" material during the access period (as well as unrestricted use of movies) was permitted. The study stated that ". . . the time in question was devoted almost entirely to non-original programming, replacing original and network re-run programming", and that while it was not clear that this would continue for the future, "it does seem likely that access time will probably be devoted to programs of lower cost and lower employment than network programming." (P. 30). The study analyzed CBS network prime-time programming for the 1962–63 and 1971–72 years, and noted a decline of 389 hours in made-for-TV material (regular TV programs and made-for-TV movies). It attributed this decline in roughly equal parts to the increase in made-for-theatre movies (none in 1962–63), 137.9 hours or 35.4%, the prime time access rule (129.9 hours or 33.4%) and increased use of re-runs (121.3 hours or 31.1%). The report also contains a number of other statistics, including the income to entities within SAG's jurisdiction for television programs, movies and television commercials. In 1971, this was $34.0 million for TV (down from previous years), $20.6 million for movies (up from 1970 but down from earlier years) and $59.2 million for commercials (down from 1970), a total of $114.4 million. Thus, more than half of the income to SAG entities is from TV commercials. The income from television programs is less than that shown for AFTRA (which represents, inter alia, actors in taped shows); but the latter, $69.3 million, includes local stations as well as programming personnel.

10. *Data advanced by the "majors" in support of their claims of injury.* While not directly related to the impact of the network cutback on U.S. program production activity, it is appropriate to note certain data advanced by the "majors" as to their assertedly poor situation generally. It is noted that theatre box-office admissions have declined, beween 1946 and 1971, from about 78 million to 16 million a week or $1.692 billion to $1.214 billion annually, which in terms of constant dollars represents in the latter year only $653 million—a 61% decline.

[3] ABC asserts that many of the actors used in commercials are not really professionals depending on acting for their livelihood, but nonetheless they must join SAG, whose unemployment figures therefore include them when they are not working at this activity. It is claimed that these figures are to this extent an overstatement of the actual unemployment situation. ABC also suggests that another contributing factor to current Hollywood unemployment may be the economies put into effect by the majors in the last two years or so, both in their film budgets and elsewhere, for example MGM's cutting its payroll by 5,000 people.

Sales to television of feature (theatrical) films and short subjects declined between 1970 and 1971 from $94.6 million to $49.3 million; sales of feature films to the networks declined between 1967 and 1970 from $249 million to $47 million. These figures of course do not include sales by these companies to the networks of films "made for television", which rose from 1% of network movies in 1965–66 to 49% in 1971–72 (in the latter year, 13 of the top 15 movies in audience ratings on the networks were made for television). As mentioned in the text of the Report and Order, the "majors" argue vigorously as to the multiple impact on them from various aspects of the rule—the cutback in network prime-time programing (of which they do a substantial amount), the constriction of the "after-market" resulting from the off-network restriction, and the limitation on the use of feature films in the access period—all in addition to restrictions against "siphoning" contained in the pay-TV and cable rules, and the problem of diminished theatre receipts.

11. *Oral argument material concerning impact on employment.* A number of guild and union representatives participated in the oral argument on July 31, making generally the same arguments and factual assertions mentioned above. The annual loss in payroll resulting from the cut in network prime-time production was estimated at $53,500,000, or 16,000 jobs (Chester Migden, SAG's Executive Secretary); others gave higher estimates. It was recognized that some of this is made up by employment in the production of the programs which have replaced network material in access time (first-run syndicated and local), but Mr. Migden stated that because of the nature of the programs involved (foreign product, U.S. game shows, and inexpensive local material in many cases) these gains did not approach the loss figure mentioned, leaving a "net loss" estimated at $25 to 30 million. SAG's unemployment figure was said still to be in the order of 85%, with earnings declining in recent years; up-dated figures for the same guild and union groups mentioned above, as of July 1973, were presented, showing higher unemployment in most cases (lower in a few). It was said that, while there are certainly other factors in the situation, the rule might be the last, back-breaking straw; and that talented creative persons and technicians were continually leaving the industry, resulting in the wasting of a national asset. The cutback in network prime-time programing was said to have particularly affected minority groups, forcing the shelving of network program projects which would have been of particular value to these groups and would have employed members of them (both talent and technicians) in large numbers. The same was said to be true with respect to women, through the cutback in new network situation comedy efforts (a form of programing with which women relate particularly, and which employs them in substantial numbers). Other union officials, concerned with the national scene rather than with "Hollywood" in particular, said that the rule had not helped their situations, and in some ways had hurt, for example a decline in network documentaries hurts cameramen engaged largely in news and documentary work, and employment in Miami TV production is down. It was also said that the networks are better employers to deal with because they are more responsible.

B. ARGUMENTS CONCERNING THE ECONOMIC FEASIBILITY OF PRESENTING "QUALITY" PRIME TIME MATERIAL VIA SYNDICATION

12. *Arguments and data of opponents.* One of the arguments vigorously urged against the rule, by opponents such as the "majors" and NBC, is the asserted impossibility of developing and distributing, via syndication, programming of "network quality". This is said to be true because of the extremely high production costs and risks involved, the "fractionated" market as opposed to total network coverage, and the inherently greater efficiency of the network process, with one sale and one copy of the material compared to "selling" each individual station and having to furnish a large number of prints of each program.

13. As to costs of production, NBC, while admitting it has little experience in producing itself, estimates that currently production costs for network-type programs are at least $100,000 per half-hour episode or $200,000 per hour program, and the Warner Brothers' estimate is about the same. Game shows, they say, can be produced much more cheaply, for $5,000–10,000 per program. NBC states that syndicated programs of the same general type as network—generally dramatic shows—can be produced for less, such as $40,000–60,000 for drama, but the lower figures represent not greater "efficiency" as urged by NAITP, but "a

much lower input of production and creative values", or matters such as less money for talent, writers, etc., and differences in production techniques and editing processes. Also, NBC points out that there is very little U.S. dramatic production for the access period, 75% of that kind of material being foreign, with the much cheaper game shows representing a less risky venture for producers and tending to dominate the access-period offerings. Some of the parties stress the risk element involved, with "pilots" costing on the order of $360,000 a half-hour or $600,000 an hour to make, and the majority of them not developing into successful programs.

14. Screen Gems states that its current production costs for network material are about $127,000 per half hour, and to produce the same show for syndication would mean about $140,000, with additional prints, advertising, etc. but not including any administrative or general expense items. It is stated that this kind of money simply is not available in syndication.

15. MCA submitted some cost and revenue figures for individual network programs, including five hour shows sold to the networks for 1970–71, twelve hour shows similarly sold for 1971–72, and three half-hour shows for 1971–72. The figures given include average cost of production per episode, average "distribution expenses" per episode (not identified), gross network revenue per episode, and per-episode deficit as far as the network sale is concerned. These figures range as follows:

	1970–71 five 1-hour shows	1971–72 twelve 1-hour shows	1971–72 3 half-hour shows
Production cost:			
Minimum	$227,387	$192,459	$110,127
Maximum	278,389	256,667	135,632
Distribution expense:			
Minimum	20,188	18,534	10,733
Maximum	31,166	29,818	13,088
Gross network revenue:			
Minimum	195,335	196,538	102,725
Maximum	[1] 235,167	226,727	108,000
Deficit:			
Minimum	21,877	15,297	20,490
Maximum	74,388	76,068	38,654

[1] 3 of the 5 programs were priced at the $235,167 figure.

Thus, there was always a deficit in producing for networks if distribution expenses are included, and in all but three cases (all one-hour) the network revenue did not cover the computed cost of production. The total deficit involved in network sales in these two seasons was $21,797,000, which must be recouped from later syndication sales.

16. MCA also submitted figures as to the syndication of its off-network programs, including the 5 program series put into syndication during the period from January 1968 through March 1971, and including sales through September 1972. These showed per-episode revenues of $35,797 to $114,092, per-episode syndication expenses from $30,739 to $71,062, and syndication per-episode profits of $5,058 to $43,030. These programs are not identified as to length. These amounts are usually less than the amount of deficit from network production referred to in the previous paragraph; but they apparently do not relate to the same programs but to programs which were produced for the networks in earlier years, when costs were lower.

17. MCA asserts that this shows that production of quality material is a risky business even when it is supported by an initial network market, and is impossible without that assistance. It is stated that non-network revenues presently available would have to be multiplied three or four times before such activity would be feasible, to meet the above production costs and also the cost of, or fee for, distribution, which MCA estimates at 35 to 40% of gross for domestic syndication and 40–60% for foreign (which would likely be higher for selling efforts involving unknown, not off-network, material). It claims it would have to multiply its sales force by 10 to engage in such efforts (a statement which Metromedia in reply claims is simply ridiculous). Such money is not forthcoming now, and there is no reason to believe it will be in the future. NBC calls attention to its

losses of $250,000 to $350,000 in one unsuccessful access-period show in the 1971–72 year on its owned stations, for which it advanced the financing but which lasted only 14 episodes.

18. NBC mentions the same distribution cost or fee as typical, and one of the items making network distribution inherently much less costly and more efficient. Its analysis of the economics involved is generally as follows: Out of each dollar of non-network advertising revenue it receives, the station typically spends about 27% in direct selling expenses and commissions, leaving at most 73¢ for programming costs (not allowing for overhead, technical expenses or profit). Of this, 26 to 29¢ would go for the distribution of the program after it is produced (the 35–40% mentioned above), leaving 44 to 47¢ for program production costs and the producer's profit, if any. However, it is asserted, actually the amount would be less because of a sum such as 10% of gross revenues which distributors incur and charge for expenses—prints, shipping, etc.—so that actually only 37–40¢ would be available for actual program production costs. By contrast, claims NBC, the networks can spend about 64% of their advertising dollars received for program costs; network costs of selling and commissions typically run about 17% of gross revenues, transmission costs on the order of some $60 million annually represent about 4%, and station compensation from the networks is about another 15%, a total of 36%.

19. Some of the opponents of the rule call attention to one of the quotations contained in the comments of one of the proponents (INTV the independent station association), in which one producer states that the average network hour show costs some $250,000 to produce and "There is absolutely no way to recoup that amount of money in syndication." However, the thrust of the entire quotation is the other way; the quotation is as follows:

"It is the barter arrangement that makes the hour shows possible in syndication. We can't sell 'Hee Haw' or 'Hollywood Palace' to stations on a per program basis and come out with a reasonable profit. What makes it happen is the sale of four minutes to national advertisers. This means that we don't have the usual distribution cost. The average hour network show costs $250,000 to produce. There is absolutely no way to recoup that amount of money in syndication. But we can do a $100,000 show in syndication and come out ahead. On a barter basis we'll come out all right. We can get about $30,000 a minute and guarantee them a minimum of 11,000,000 homes each week and make the profits we need to continue."

20. *Arguments and data of proponents.* Some of the proponents of the rule—notably NAITP, INTV, ABC, Westinghouse and Metromedia—vigorously dispute these contentions. It is asserted that production costs can be and are much lower than those mentioned above; NAITP estimates $61,000 per half hour for drama ($27,000 "above the line" for creative elements such as talent and writers, $34,000 "below the line" for facilities, technical personnel, etc.), $43,000 for a variety show and $21,000 for a documentary ($8,000 and $13,000 above and below the line). Westinghouse gives production cost figures (per episode) for the six programs it produced and distributed for use in access time: between $40,000 and $50,000 for *Norman Corwin Presents* (a dramatic series), between $50,000 and $60,000 for the two *David Frost Revue* series, and three others under $40,000 (none of these programs is still in production). ABC notes in reply comments that not all of MCA's "network quality" production involves costs of the magnitude mentioned above; it has recently sold to ABC new 90-minute dramatic, anthology-type movies in the $100–110,000 range (for three plays), less than one-third the price of a prime-time 90-minute movie for two plays. Metromedia in reply comments refers to two of its programs, one new syndication this coming season (*Dusty's Trail*) with a cost in the order of $80,000, and another on ABC costing slightly over $100,000 per episode; it is stated that the programs are essentially of the same cost level but the second is higher because it is for a network. It is asserted that the tremendously successful CBS *All in the Family* program started in the $55,000 range.

21. NAITP asserts that independent producers can produce a given type of program for 50–60% of the cost which the same material would involve if produced for a network. It is claimed that independent producers are much more flexible, and can produce without having to contribute to the support of a vast network and its people, or subsidize elaborate and somewhat outmoded facili-

ties, which producers working closely with the networks or the "majors" are required to use, often at inflated prices so that the owners can make a profit from such use. In general, it is claimed that independent producers can operate free of the archaic and expensive practices which have grown up in the industry. They are particularly able to save in "below the line" costs, but also in "above the line" costs for talent, etc., because the latter will often work more cheaply for independent producers than for a producer working for a network (to some extent this is because more of the talent are newcomers without the high prices of established stars, but also because they get a 26-week rather than a 13-week commitment, they sometimes get or have the possibility of getting a share in the profits of the program if it is successful, and in a general way they are aware of the differing nature of the syndication production business). ABC also asserts that "Hollywood production" in the traditional sense is expensive, with "featherbedding" as well as other burdensome practices, so that an independent producer can operate more cheaply. ABC's reference to the Black Beauty program in this connection has already been mentioned.

22. These parties also dispute the contentions as to the cost of distribution. Metromedia claims that while it would, as a syndication distributor, charge someone else about 35% for distributing his program, this is definitely not true of Metromedia's own programs such as *Dusty's Trail*. (See the discussion of the Josephs statement below). It is also claimed that MCA's argument about having to expand its sales force 10 times is ridiculous; Metromedia sold its *Primus* access program in 1971, and will sell *Dusty's Trail* (plus other material) with only 5 or 6 people. It is also claimed that the selling job may actually be easier with syndicated material than for a network program; there are many more buyers, the producer gets a commitment for 26 weeks instead of 13, and he has more creative freedom. NAITP claims (without specific detail) that the distribution and production costs come from an entirely different "pool" of money, so that more for distribution does not necessarily mean less for production.

23. *Some other points are urged.* It is claimed by ABC that the syndication market can produce considerably more revenue than it has so far, and that stations will pay higher prices as first-run syndicated programming becomes established. ABC Films experience is to this effect. NAITP claims that by no means all of the top 50 markets have to be sold in order for a profit to be realized, even for a dramatic show; 8 of the top 10 is enough. In overall terms, it is asserted that a dramatic show requires 60 of the top 100 markets, compared to 35 for a documentary and 40 for a variety show. ABC urges that the selling effort and economic base for an access-period program need not necessarily be limited to prime time; of the 58 access-period syndicated programs included in its listing, it shows that 32 were also used by some stations in non-prime time, including 7 with more such stations than prime-time users, and three others with more than 10 non-prime time presentations. Metromedia, discussing the value of first-run syndicated material, asserts that in earlier years, before total network dominance, three of the most successful re-run series were never on a network (*Seahunt, Highway Patrol, I Led Three Lives*).

24. One of the reply comments, that of INTV, the independent station association, was devoted almost entirely to this subject, including a long transcript of an interview with Mr. Kenneth Josephs, vice president of Metromedia Producers Corp. The comments themselves (aside from the transcript) urge the following points: (1) a substantial number of producers and distributors do not agree with the dim view expressed by MCA et al, and are "prepared to stake their financial and creative futures accordingly." (2) the "access period" represents a new departure in programing and its economics, using first-run syndicated product where there was virtually none immediately before, and "prime time" was filled with network or off-network product. As stations adjust to the rule, they will be willing to pay the higher prices which can be supported by the larger prime-time audiences and higher advertising rates—"national volume moving toward levels sufficient to justify expensive first-run production." Examples are cited of four unidentified programs, one selling for $500 in one market before the rule, $750 in the first year, $1,000 in 1972–73 and $1,500 for the 1973–74 year; two others jumping from $250 the first year to $650 and $750 the second (and the latter to $1,000 for the coming year); and a fourth going from $600 at 7 p.m. just before the rule, to $1,000 at 7:30 the first year and $1,400 the second year.

25. Also set forth are earning projections for the future by two unidentified producers with respect to specific but unidentified programs. One is a program which is expected to earn $50,000 a week domestically in about 70 markets (45 of the top 50), or $100,000 per original episode (assuming 26–26). In the second year, if successful, it can be expected to reach 105 markets, $80–90,000 per week, or $160–180,000 per original episode. The figures for the third year, again assuming success, should be 130 markets and $100,000 per week ($200,000 per original). If the original-repeat ratio is less, say 39–13, the income would be a third less per original. A strip program should generate three times these amounts. Distribution costs vary from 15 to 35%, averaging about 25%. Another producer estimated that (on a 26–26 basis), assuming sales the first year in 100 markets including the top 50, the domestic income from a film program would be $67,000 per original, rising to $76,900 the second year and $86,500 the third year. Another program, non-film, would bring in $57,000 the first year, $67,000 the second. A third projection is more general. According to TVB figures, an average half-hour of "spot" time in the top 50 markets is worth $120,000 if it contains 5 commercial minutes, or $72,000 if it contains three, or, assuming a 26–26 new-repeat ratio, $240,000 or $120,000 per original. It is stated that station payment practices now are on the order of the price of one 30-second spot, but they may be expected to rise with time.

26. The comments also make the same point mentioned above concerning greater independent-producer flexibility in use of studio facilities, and the high overhead figures charged to "major" productions, which really distort the actual cost picture by charging to the production various services at inflated prices so as to make a profit on them while building up the "loss" figure. The same is true of distribution costs. One producer is quoted as saying that "the cost depends on how you structure the deal; on whether you are paying the talent a percentage, a fee; how you buy your facilities; how much overhead you're putting into the budget", so that a cost difference of 30% is quite possible, with tape shows costing less. It is asserted that *All in the Family*, on tape, started with a price in the $45–65,000 range. The comments also advance the point—elaborated in the Josephs interview discussed below—that syndication and network sale and distribution are basically not much different (for network-type "drama" programs), with the first sale in each case generally no more than breaking even or showing a slight loss, the real profit to be realized later from sale for "stripping" and overseas use—so that independent producers have a real incentive even if their first-run costs of distribution, etc., are relatively high. Attention is called to Viacom's plans early this year to produce its "Addams Family Fun House" series, with cooperative backing by various multiple owner groups and other interested stations; we note, however, that apparently this program project has not come to fruition. The comments also mention barter as a useful financing arrangement stimulating syndication production.

27. A long attachment to the INTV reply comments is a report of an interview with Mr. Ken Josephs, vice president of Metromedia Producers Corp. Much of this concerns the *Primus* series which Metromedia produced and sold for access-period use during the first rule of the year (but which was not continued), and the *Dusty's Trail* series which this company is presenting for the coming season. As to *Primus*, Mr. Josephs stated that its cost was $74,000 per episode, and was sold by five or six people (including himself), in 92 U.S. markets and over 30 foreign countries. Unfortunately, it was not a success, largely because of the late date (spring 1971) at which time the prime time access rule and the "access period" became established. Thus, in order to meet the production schedule no pilot was produced, and certain otherwise avoidable errors were made—but then this is a very risky business. Mr. Josephs also stressed the point mentioned above, that production for syndication and for networks are basically the same in that the real profit comes relatively late in the game, with quite likely a small loss the first year even for a successful show, and only slight profits the next three years. Another point is that "overhead" may vary tremendously, depending on what a company wants to do, for example, to cover initially as a cost item the cost of studios, executive salaries, etc. Thus, the overhead figure can vary from 10 to 40%—meaning a program with an actual shooting cost of $70,000 per episode may "cost" $77,000 to $98,000. For *Primus*, the budget figure of $74,000 included 10% overhead. The same was said to be true

of distribution costs or fees; 35% should represent a handsome profit, and the costs for *Primus* were between 9 and 10%.

28. Mr. Josephs also mentioned some of the economies possible with syndicated production, for example use of 16 mm film, which the networks resist for regular programs (though they accept it in *Cousteau* and similar material) but which is good enough under today's conditions, and the point concerning talent, mentioned above, he stated as follows with respect to higher production costs of programs made for networks:

"We have produced for networks, there is no question that when the network has control over a series, and they want you to do and redo certain things, reshoot, that the production can become more expensive than when you are your own master in syndication. Whether or not these decisions to add expenses are going to improve the quality of the show is a subjective judgment."

As to the new *Dusty's Trail* program, this is budgeted at $75,000–$80,000 per episode, includes about $8,000 overhead (but not amortization of the $190,000 pilot cost); it was stated that this would cost over $100,000 if it were for a network.[4] It is estimated that the show will gross about $100,000 per episode (domestic and foreign) the first year, which would mean about $20,000 per episode above production costs; but allowing for 9–10% out-of-pocket distribution costs, plus advertising prints, etc., the result on that basis would be about a break-even or small loss. (He will be satisfied with $75,000 domestic and $25,000 net foreign). If the show is successful, there will be slight increases in the next three years, but still nothing, at that point, to justify the total investment. But then the company will have 104 episodes, which it can sell as a "strip" vehicle—for something like $50,000–60,000 per negative, or more than $6 million total, representing a profit of $3 million. With respect to material like this, which has a long-range rerun potential (unlike material such as *All in the Family*), no one expects to make a killing either during the network run, for a network program, or during the first few years of syndication sales for a syndicated program; it is the "strip" potential which is important.

29. Mr. Josephs stated that Metromedia sets up its rate card, for this and other programs, to show a substantial profit if every market were sold at the card rate; but this doesn't happen. Markets outside of the top 50 are often entirely off-network re-run users; in the top 50 markets some affiliated stations may be showing a stripped game show or movies so that they are not potential customers, leaving only one potental buyer who will not be willing to pay the card rate. The program is not designed for independent stations, though Metromedia will sell to them rather than let the program go begging in the market (*Primus* was not sold to any). These stations are more interested in strip material.

30. With respect to its other new access-period show, *Elephant Boy*, Metromedia acts as U.S. distributor for this program, made in Ceylon by a combination of the German network and Global, a British company, which is part of ITV. Metromedia's fee is higher than 30%. The producing companies can get more money out of European sale than could an American company for an American program; so they regard the U.S. as just one market, not a critical one. Metromedia prices this program lower than "Dusty's Trail".

31. With respect to price received generally, Mr. Josephs emphasized that it varies considerably with the time of day when the program will be used by the station—early daytime, 4:30 to 6 (Class B or C time, when off-network re-runs prevail) or prime time—and, of course, varying with the success of the show. As to syndicated access-period programs compared to off-network re-runs, he estimated that, overall, the price for six runs of an off-network show such as "That Girl", used largely in "fringe" time, would be about the same as that for two uses of an access-period program in prime time. Overall, he believed that

[4] The creative people involved in this program are at least reasonably well established, including the producer of *Brady Bunch* and *Gilligan's Island*, and two stars from former successful network series, as well as two featured actresses from "Petticoat Junction". It is stated that their contracts call for one price for network use and a lower one if the program is sold in syndication. The pilot cost of $190,000 included about $145,000 in shooting cost and $45,000 for acquisition of the concept and development money. If the overhead cost were a third instead, or $24,000, the per-episode cost would be shown as $96,000; and if a 35% distribution fee were added, this would be $35,000 of the anticipated $100,000 gross. On these assumptions, the program would show a loss of $31,000 per episode.

the potential for access-period first run programming is one and a half times the negative cost, though not necessarily in the first year. In other words, if *Dusty's Trail* is a hit, it will gross over $100,000 per episode domestically, but probably will only gross about $75,000 the first year.

32. Mr. Josephs was also asked about the international and balance-of-payment situation. On the basis of considerable experience in both domestic and international dealings, he stated that far more money comes to the U.S. through television than goes out, a much more favorable balance of payments situation than for the economy generally.

33. *Material in the oral argument.* A number of officials of the major film production studios, and two successful producers working usually with the networks (Bud Yorkin and Lee Rich, both members of the National Committee of Independent Television Producers, which opposed the rule), appeared at the oral argument on July 30 and 31, along with Paul Klein, an economic analyst of the industry, all opposing the rule and urging that programing like that on the networks simply cannot be developed in syndication. Those participating on the proponent side include A. Frank Reel of Metromedia Producers Corp., Nick Vanoff, producer of the *Hee Haw* syndicated program, and other NAITP members and that organization's counsel. In general, the facts and arguments were the same as or similar to those mentioned above.

34. As to costs, the opponents emphasized the high cost of creating network programs; for example, Mr. Yorkin stated that the cost of writing alone for *All in the Family* was $12,500 per program (more than the entire cost of producing a game show), with the Writers Guild minimum being $4,100 per week after two scripts, and few shows being able to make do with one writer. It was said that syndication could not possibly support *The Waltons*, with its cast of 11, or a program such as *Pomeroy's People*, of significance to Black groups, which the networks would have presented were it not for the restriction of the rule. A 20th Century Fox official stated that while that company has been active and reasonably successful in production for first-run syndication under the rule, it has always required two conditions: (1) a deal with a network-owned station group; and (2) lower-cost foreign production (*Circus, Family Classics, Starlost*). With respect to the *Dr. Kildare* program, the statement by an MGM official (who was not actually at the argument) was to the effect that because of its more limited economic base this program was not as good as the earlier network program of the same name, or current network programs, but had to use old scripts and lesser-known actors and otherwise skimp on production values (another participant said that the average income for the series was between $50,000 and $55,000 per episode, which did not cover direct costs).[5] An MCA official, Mr. Friedland, stated that any cut in costs—for example, as between $100,000 and $75,000 per episode—will come from "above the line" costs for talent, writers, directors, etc., and not "below the line" (technicians, facilities, etc.); and that while there is not a one-one relationship between cost and quality, the two do go together; you have to pay more for the best talent and other people. Mr. Friedland said that he and MCA had not been able to make an acceptable syndicated series for $30,000 per episode plus free use of facilities, crews, and performers worth $50,000 per episode.

35. On the other side, it was stated by counsel for NAITP that a first-run syndicated show can be produced for 30% less than a similar network show; Nick Vanoff stated on the basis of his experience that the *Hee Haw* talent work for less now than they did when the show was on CBS, and Mr. Reel's statement was the same as to *Dusty's Trail* (Hee Haw has 36 performers and 11 musicians, and is said to give employment altogether to 150 persons). Other savings mentioned by Messrs. Vanoff and Reel included the independent producer's being able to shop around for economical facilities rather than having to use those of the networks or the "majors", and being able to use 16 mm rather than 35 mm film (the networks require the latter in regular series, although they will take 16 mm "outdoor" material such as *National Geographic*). According to Mr. Reel, *Dusty's Trail* costs about $80,000 per episode, and the earlier Metromedia *Primus* program cost about $75,000, both grossing in revenue about $62,000 domestic and $20,000 foreign.

[5] The Kildare program was described as having audience ratings "among the best", but this was not true in all markets (e.g. Washington, D.C.).

36. As to potential revenues, Mr. Klein, the economic analyst testifying for the opponents, estimated that maximum first-run syndicated revenue from U.S. sales is about $58,000 gross per episode ($35,000 first-run, $23,000 repeat). This was figured on average audience of about 7,700,000 homes for such prime-time material, station 30-second spot rates based on $1.50 per thousand homes, station willingness to pay roughly the price of 3 30-second spots for a program episode. From this would have to come the considerable costs of sales and distribution in syndication, multiple prints, etc., which would cut the net figure to about $45,000. Using the same type of formula (assuming average network audience of 12,500,000 homes, average network charge to advertisers of $2 per thousand), Mr. Klein figured a first-run network per-episode income of $150,000 gross, which would be reduced by advertising commissions and station compensation to $96,000; the second-run income would be $67,000, for a total of $163,000. Mr. Friedland stated that in the heyday of syndication 15 to 20 years ago, $40,000 was about the top income that could be expected, and it was now only about $45,000, and one would be lucky to get that—$30,000 from an owned station group, and $15,000 from the rest of the country.

37. Mr. Reel, on behalf of Metromedia, went through a somewhat similar analysis to that of Mr. Klein, and came up with $144,000 income per half hour, assuming $3 per thousand for one minute as the general basis of station rates, 12 million homes, and 4 minutes per half-hour. It was stated by another participant in the argument that *Let's Make a Deal*, one of the successful game shows, grosses $80,000 per episode, which is a great deal more than it takes to produce this program, the money thus earned has helped to support production of the new *It Pays to be Ignorant* comedy series.

Separate Statement by Chairman Dean Burch

For the reasons I stated at length in 23 FCC 2d 411 (1970) and 25 FCC 2d 337 (1970), I believe the prime time access rule should be repealed. It has failed to achieve any of its objectives, whether explicit, implicit, or subliminal.

Because today's action might have been worse, I concur in it—but with one proviso: Any notion that the rule, with or without the modifications adopted here, represents a serious attempt to come to grips with network dominance of the television programming market is a myth. How much better it would have been had the Commission expended a comparable amount of its resources and talents on sober study and rational action dealing directly with the fundamental problem.

That *was* the Commission's responsibility in 1970. It still is.

Dissenting Statement of Chairman Dean Burch in Which Commissioner Wells Concurs

The majority of the Commission has today acted on a proceeding that began with a notice in 1965, but whose origin really goes back over a decade. The thrust of my dissent is directed to the so-called prime time access rule (Formerly Westinghouse plan, formerly modified 50–50 plan).

The basis of this rule is that as of today, as evidenced by the data in the report and order, the three network organizations, ABC, NBC, and CBS, supply either through their own production efforts or through joint ventures with independent producers approximately 96.7 percent of the network programing which dominates the prime time viewing[1] hours. At the present time networks during the 7–11 p.m. (e.s.t.) time period feed 3½ hours of network programing, with 30 minutes being left for the stations themselves to supply out of their own resources. The rule would require that during this period (of 7–11 p.m. (e.s.t.))

[1] Thus, network affiliates in 1968 carried an average of between 3.3 and 4.7 (depending upon size of market) hours a week of nonnetwork programing between the hours of 7–11 p.m. out of the total of 28 hours; between the hours of 7:30–10:30 p.m. the figure is from 1.2 to 1.6 hours.

the affiliates carry no more than 3 hours of programing, the net result being an additional 30 minutes per night of time which must be supplied by the local station, either from locally developed programing or from syndicated materials which they can purchase through the syndication market. One other proviso of the rule (which I will comment upon hereafter) is that during the 1-hour period from which network programing is to be excluded, the affiliated stations may not use an off-network syndication series or feature film previously broadcast in the market.

The rationale for this rule goes somewhat as follows: The networks compete vigorously; however, they tend to parallel each other in programing. There is no healthy syndication market in this country because the sine qua non of syndication is access to prime time in the top 50 markets. Ergo, by making prime time available in the top 50 markets, a healthy syndication market will emerge, the competitive system will have been stimulated, and—presumably—the public will benefit.

I want to make it clear that I do not quarrel with the motives of the majority in this rulemaking, to the extent that they are hopeful—although, as I will show, Pollyannish—that this rule will in fact stimulate a healthy independent syndication market, and the public will be substantially enriched by new programing fare. I believe that an unstated premise of the rule adopted today, and one which I think must be faced, is that if a majority of the Commission were satisfied with the present network product, this rule would be deemed unnecessary. I thus believe that, despite protestations to the contrary, the rule is basically a reflection of the Commission's judgment that programing today does not satisfy its standards of diversity. Another parallel unstated premise is the assumption that because of economic motives the networks are purposefully depriving the public of the programing to which it is entitled.

Before proceeding to a discussion of the rule itself, it is necessary to say a word about the pattern of network programing today; namely, that the networks themselves produce or coproduce some 97 percent of the programing. Thus, as to the three networks combined, network participation in all evening (6–11 p.m.) programs rose from 38.5 percent in 1957 to 80.4 percent in 1968, a figure which, when added to the number of network produced shows, reveals a rise from 67.2 to 96.7 percent. Stated differently, independently provided shows decreased from 32.8 percent in 1957 to 3.3 percent in 1968. Similar figures reflect the trend when only entertainment shows are looked to (see par. 12, report and order).

There are a number of reasons for this development, but the prime one is simply economics. Programing is expensive; advertisers have insisted during the past few years on availability of 30-second commercials and have not been interested in sponsoring complete shows. Whether this is good or bad, it is a fact.

The costs of network quality programs have risen enormously. In 1957 a 30-minute network show could be produced for approximately $15,000; in 1968, its cost was $87,000 per half hour, whereas today the information available to the Commission indicates that a 30-minute network quality color show will cost the producer from $100,000 to $150,000.

Quite obviously, the foregoing facts pose a serious problem to entrepreneurs who seek to provide quality shows to stations. The networks can meet these problems because, by the very nature of networking, they can and do deliver, even without option time, the great majority of their affiliates during prime time on an established economically feasible interconnected basis, and are uniquely able to sell spots to national advertisers in the manner now desired by such advertisers. Again, let me say that I am not necessarily defending the system, but I think that we must face reality rather than what we might hope and these are the facts today.

With this as background, I turn to what I believe is a fatal flaw in the reasoning of the majority. That reasoning is that, given access to prime time in top markets, syndicators will immediately produce quality programing which will be made available to the stations because it will be profitable to the syndicator and to the station. The real problem with the rule is that this premise has not been demonstrated to be true, and, in fact, the evidence before the Commission presently indicates that it is indeed faulty. Why? Simply because the syndicator, even though assured of a shot at the prime time of affiliates in the top 50 markets, can certainly not be assured that his program is going to be selected by a suffi-

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cient number of stations in such markets. Even if the program is selected under existing economics and tax structures, it is quite clear that very great amounts of capital will be required to produce programing, with much of this capital having to be amortized for a long period of time. The fractionated top 50 market is simply not sufficient to sustain the expensive programing effort here required. In short, today in the programing field, money is the name of the game, and unfortunately, the Commission, despite its plenary power to regulate, cannot so easily regulate the laws of economics.

Thus, taking the majority's action at face value, I believe that it is an economic mistake—that it will not produce the result sought, a healthy television film producing market.

Let me turn briefly to another aspect—whether it will result in diversity of programing. Assuming that the rule does have substantial or some efficacy, I strongly believe that there will be little, if any, contribution to real diversity of programing. What will be produced under the aegis of this rule will simply be more of the same—more games, more light entertainment along proven formulas, more "emcee" talk shows. Both the producer and the affiliate will inevitably drift very largely to the sure thing—the tried and true—because of the economics of the system under the rule; indeed, those economics may well dictate programing produced with reduced resources. Time will of course supply the definitive answer here, but unfortunately for the viewing public, I feel confident that my assessment will prove correct.

It may be argued that so what? Why not try this approach, and if it does not work, return to the drawing board. But there is an old medical adage, "First, above all, do no harm to the patient." The Commission today violates that prescription in several important ways.

First, the public in the top 50 markets will be deprived of significant amounts of popular high quality network fare in the prime viewing hours, and in my judgment of the economics, that fare will not be replaced by the equivalent high quality, first-run syndicated programing visualized by the majority. Second, in the smaller markets, it is also clear that there will be a similar deprivation, and indeed, one which will have a much larger adverse impact upon the stations and consequently the viewing public in those markets. The rule purports to exempt the markets below the top 50. In practical effect, there is no such exemption. Here again the economics give the answer; to produce and distribute very costly programs for markets which represent only a small percentage of the population is simply not feasible. The networks have indicated that they will not continue to feed 3½ hours of programing just for the below 50 markets, and while the Commission may talk of ordering the waves to roll back, it is just not practical.

This has much more serious consequences for these markets. There is simply not the same advertising base for relatively high cost programing in these markets. The stations may therefore be unable to maintain such programing, even assuming arguendo that it would be supplied by nonnetwork sources.

Third, the rule purports to benefit the new UHF independents coming on the air. But here again the practicalities undermine the theory. Because of the rule, the VHF stations will be seeking more nonnetwork programing, and are in a position to outbid the struggling new UHF, which depends almost entirely on such programing. Because of this consideration, the association of UHF broadcasters (ACTS) recently and in strong terms counseled that the rule will hurt, not help, UHF.

Finally, there is the consideration of the effect on enhanced dissemination of news programing. The originally proposed rule (so-called 50–50) would have exempted newscasts, news interviews, etc., and specifically requested comment on whether news documentaries should be exempted. I fully agree with the exemption in the rule adopted for on-the-spot coverage of news events, and political broadcasts. I disagree, however, with the majority's failure to exempt news interviews and most importantly, the news documentary and the newscast which are, after all, the chief means of informing the public on events and issues. When the question of exemption for the present rule came before the Commission, the majority, aware that the networks could avoid the impact of the rule by extending the 30-minute evening news show into a 1-hour news show, determined not to exempt the newscast. In my opinion, if this rule had resulted in additional prime time news programing—the thing which network television can and does

do best—that would have been a benefit to the entire country. Because of its stated concern over the syndication market, the majority forecloses this possibility. The majority also forecloses the possibility of an enhanced number of news documentaries, and indeed may be inducing a cutback in such programing. I strongly believe that the Commission cannot properly adopt a policy of subordinating news programing, which informs the public and is surely not in oversupply, to entertainment programing, which exists in far greater amounts and seeks but to amuse. So on this ground also, I believe that the rule is seriously defective: however, even if remedied in this respect, the rule would still be undesirable, for the other reasons developed.

There is a procedural matter which also concerns me greatly. Immediately prior to the final adoption of the rule in the open rulemaking proceeding, the Commission, through telegrams, letters, and other presentations, learned that the west coast syndication market itself, the very people who are supposed to be helped by this rule, were greatly concerned that in fact they would be harmed because their major source of income—the networks—would cut back on programing. This point of view was reinforced by a great number of the California labor organizations as well as knowledgeable people from all parts of the industry. These very interested persons requested the Commission to adopt a tentative rule, which would be subject to comment by all interested parties and then, on such a full record, adopt the rule in final form, with such revisions as are appropriate. This procedure, which the Commission recently followed in the computer proceeding (docket No. 16979), seemed to me to be most reasonable, and I therefore moved its adoption. This was denied on the ground that the matter has been kicking around for 5 years, had been subject to full opportunity for comment, and should now be acted upon. I am in sympathy with the idea that we should not take 5 years to do anything, but nevertheless, in the face of mounting evidence that the rule, rather than being beneficial, might actually be harmful, the better part of administrative valor would surely have been to go along with the suggested procedure. I repeat that the first requisite of Commission action is not that it act, but that it act with reasonable assurance of promoting the public interest.

Further, I do not believe that there has been such full opportunity to develop a record on the rule adopted by the Commission. Take, for example, an important part of the rule, the proscription in subsection (3) of 73.658(k) of off-network program series and feature films previously broadcast in the market, in the time period from which network programing is barred. This was not proposed by the Commission, and there has been no record developed on this important aspect. Thus, the Commission today has no data whatsoever as to the economic impact of this particular provision, both on the efficacy of the rule and upon the contractual arrangements of the stations. To what extent, for example, have these affiliated stations purchased series or feature films, with the express purpose (and payment therefor) of presenting them in prime time? What is the effect on the syndicators and the film producers—the persons sought to be helped by this rule? Granted, these are all economic concerns, but, as I have stated before, economics is really what this rule is all about, and the Commission should at least have had up-to-date information in this field before acting.

The Commission does state in paragraph 38 of the Report and Order that it will consider some of these matters on a motion for reconsideration. This is contrary to good administrative procedure, and indeed to commonsense. If there is a substantial question as to the efficacy of the rule, that question should be reached prior to adoption of the rule, not after. Otherwise, the matter smacks of sentence first, judgment later. This Commission has only so many regulatory arrows in the quiver and when it takes a major step such as this rule, it should be taken with full knowledge of all the pertinent facts and after consideration of all the potential benefits and harms that might flow from the rule.

Having set forth my objections to the procedure and substance of the rule, I want to address one last aspect of this rule and indeed of regulatory philosophy in general. The proponents of this rule will argue there is a problem and the Commission has acted to meet that problem. In other words, rather than cursing the darkness, they have lit a candle. My answer to that is simply, "Yes, there

were and are a number of candles available but in my opinion, this is not one, but rather a sky rocket—flashy, momentarily pleasing, but with no substance." Since we are dealing with economics, if the Commission really wishes to make available to the public diverse programing, it must encourage a different economic base for program presentation. Quite obviously, so long as a broadcaster has only one channel on which to operate, his economic requirements will tend to make him program that one channel for a mass audience. Accordingly, minority needs or tastes will be denied or underserved. This means, in turn, rather than spending years on a rule of this nature, the Commission must concentrate on the obvious alternatives which have a different economic base and thus may make a genuine contribution to diversity. These alternatives do exist and have not yet come to fruition.

First, there is subscription television, which has a different economic base and can present programing that is not necessarily designed for a mass audience and still be economically attractive for an entrepreneur. There is cable casting, a technology which makes multiple channels available and which by its very nature changes the entire economics of programing.

There is the noncommercial educational television system, which, with sufficient and appropriate funding, can make a tremendous contribution to diversity.

Nevertheless, the Commission has moved ahead with this rule—in my opinion simply because it was there. Although it is difficult in this day and age to make specific forecasts as to what will happen, I predict—unhappily—that if this rule is adopted in its present form, after the passage of a few years, there will be no genuine benefit to the independent film industry at least sufficient to offset the detriments to the broadcaster and most importantly to the viewing public. The rule may shift some dollars from one pocket to another and maybe this is good. It may very well harm the networks to some extent, great or large, and in some people's minds, this seems to be worthwhile. In conclusion, while respecting the motives and objectives of the majority in this case, I simply feel that they have wasted the resources and energies of this Commission in a futile effort to administratively tamper with the economics of programing as it exists rather than attempting to create a situation where the economics could make sense.

Concurring Statement of Commissioner Kenneth A. Cox

I concur fully in the action here, though there are some respects in which I would have liked to do things differently. I would like to add some individual comments, primarily addressed to Chairman Burch's dissenting statement.

I share some of his concerns. Like many actions the Commission takes, the resolution of this matter is not guaranteed to produce the results we seek. However, based on the record in this long proceeding and on study of this problem for over 14 years, I think this is the most logical and effective step we can take to correct a serious problem.

Dissenting Statement of Chairman Burch

On May 4, 1970, the Commission refused to reconsider its adoption of the so-called "Prime Time Access Rule." I dissented to the initial action[1] and now dissent to the refusal to grant reconsideration. I am more convinced than ever from reading the recent pleadings in this case that the concerns I expressed in my prior dissent are justified.

I had expressed grave reservations about the rule being adopted before there had been a full opportunity to develop the necessary data upon which any intelligent decision could be made. I have set forth in some detail my view that the rule simply goes against the economics of program production and distribution, and will therefore fail of its purpose. I have also set forth that this will not be a "noble failure"—that on the contrary, the rule will have serious adverse consequences to the public interest. I will not repeat that discussion, and indeed, would ordinarily not issue a further dissenting statement. But there is one particular

[1] See Dissenting Statement of Chairman Burch, FCC 70-466, 23 F.C.C. 2d 411 (1970).

aspect as to which further information is now available and which does therefore call for further comment. I refer to the adverse effect of the Rule on affiliated stations in the markets below the top 50.

Apparently my worst fears are borne out by the additional data we received in support of reconsideration. Our staff has concluded there will be substantial adverse effects on many affiliates in smaller markets and that between 30 and 40 small stations (many of which are UHF) would suffer declines in revenue of between $25–30,000 each as a result of the rule. This is a significant amount considering their total revenue and income. It is also speculated that the cutbacks necessitated by this drop in revenue will come in the area of news and public affairs programming.

Although the majority is not moved by the reduction in service and financial loss facing these stations, I am. The majority considers such consequences to be outweighed by the "public interest benefit" that *might* obtain from the rule. The touchstone of Commission action is of course the public interest. The Commission has long and consistently held that the public interest is served by promoting strong local service, including in the smaller markets, and by fostering the development of UHF stations. The majority now knows *definitely* that its action is against the public interest in these important respects. Since that is so, there is all the more need for a strong, compelling showing of benefits which would outweigh these most serious drawbacks. There is no such showing here, and indeed, as I have made clear, the contrary is indicated. In short, as I pointed out in my earlier dissent, adverse impact is a calculated risk that is only worth taking when the advantages to be gained are real and substantial—not ephemeral and unlikely.

I'm sure that the citizens in the small communities affected will be heartened to hear that while the action we have affirmed today will have adverse impact on the stations they view, our expertise shows that even with the adversity we have heaped upon their already marginal operations, they probably will be able to stay in business. I'm sure this also is small solace to the stations.

I thus believe the potential financial damage to this many stations far outweighs the tenuous hope of bolstering the independent syndication markets to which the majority clings in denying reconsideration.

Separate Concurring Statement of Commissioner Charlotte T. Reid

Today the Commission adds yet another chapter of verse to the continuing saga of the "Prime Time Access" Rule.

Since my appointment to this Commission over two years ago, I have heard innumerable complaints from the viewing audience as well as many others about this rule. Based upon the evidence before us, I believe that the total repeal of the rule would have been much more in the public interest. However, I fully appreciate the fact that one must accept realities as they occur.

During the course of our many discussions on this matter it became quite apparent that there was not going to be a majority of votes for repeal of the rule at this time. Since the compromise evidenced by this document seemed to be the closest to total repeal that could be obtained, I decided to concur in its adoption. I want to be absolutely certain however that proper notice is given, here and now, to those who have supported the prime time access rule in the past that unless something better is given to the viewing public than that which has been given in the past few years, then I firmly believe that the public interest would best be served by a complete repeal of the rule.

CONCURRING STATEMENT OF COMMISSIONER RICHARD E. WILEY

I have concurred in the adoption of this Report and Order because retention of the rule, as amended, holds out at least some promise of achieving a measure of diversity in sources of program production, because it represents our best effort to bring some order out of a panoply of waiver requests and associated administrative problems and—quite frankly—because it was capable of achieving some consensus within the Commission, however fragile.

A consensus is something which, in its four corners, does not satisfy all parties to the fullest. And so it is with me in a number of particulars. However, in this statement, I would like to focus on only one area of reservation—that relating to paragraph 88 of the Report.

My concern is that, in our zeal to encourage the development of programming which we believe to be responsive to public needs, we may have been somewhat improvident in setting forth our expectations as to the use of "cleared" 7:30 time periods for "locally significant material".

Initially, let me say that I recognize that the Commission has a legitimate responsibility to help determine the composition of broadcast "traffic". *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 215–16 (1943). For example, we long ago called attention to the continuing obligation of broadcast licensees to keep their community informed in the area of news, public affairs and related programming. *Report on Editorializing*, 13 F.C.C. 1246, 1249 (1949). Moreover, I lend my complete endorsement to the suggestion that all licensees should redouble their efforts to seek out and meet the requirements of all viewers. And, indeed, I personally applaud special programming efforts by broadcasters responsive to the needs and interests of children, minorities and, as ascertained, the local community. See our *Network Programming Inquiry*, F.R. 60–7198, FCC 60–970, where we listed the major programming elements "usually" necessary to meet the public interest.

Perhaps, then, it is only a subtle distinction between our recognition of the public interest value of such programming, and our exhortation to licensees that we *expect* an "appropriate portion" of "cleared time" (or at least of total prime-time) to be devoted to the particular needs of children, minority groups and the community. Nevertheless, I must confess to some trepidation that our "expectation" will be read to mean a demand, and that our "raised eye-brow" is synonymous with a decree for specific program types and amounts. The difficulty, of course, is not that the programming needs of children, for example, should go unrecognized by this Commission. On the contrary, the public interest means nothing if it permits licensees to ignore significant groups within their community. I question, however, whether this agency can hereafter avoid further particularization of other rather specific program needs which it believes should be singled out for special treatment during particular portions of the broadcast

day. Perhaps it is less than completely satisfactory to rely on licensee ascertainment and programming discretion; yet I fear that the alternative of governmentally suggested program material to be carried in particular time segments may prove to be an unwise substitute. Accordingly, while our objective in paragraph 88 is well intentioned, and while I have no personal quarrel with the enumerated categories, I believe it to be prudent to at least set forth my reservations.

F.C.C. 74-69

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PETITION FOR RULE MAKING TO REQUIRE BROADCAST LICENSEES TO MAINTAIN CERTAIN PROGRAM RECORDS	Docket No. 19667 RM-1475

FURTHER NOTICE OF PROPOSED RULE MAKING

(Adopted: January 23, 1974; Released: January 29, 1974)

BY THE COMMISSION:

1. The Commission has before it a proposal on its own motion looking toward adoption of rules to permit the reproduction of material in television station public files.

2. On January 3, 1974, the Commission adopted a First Report and Order in this proceeding (FCC 74-24, released January 9, 1974) amending the Commission's rules to provide for public inspection of television station program logs and to establish the procedures which would apply to inspection requests. Among other things, the rules which we adopted permitted the inspecting party to obtain copies of these logs if they were willing to assume the costs of reproduction. Under the newly adopted rules, copies of all logs open to inspection may be copied except for the composite week logs which are part of the regular public inspection file. Thus, the anomalous situation which exists is one in which copies may be had of newly public material but not for the material traditionally available pursuant to the provisions of Section 1.526 of the Commission's rules. While some stations may permit copying, none is now obliged to do so.

3. Accordingly, we invite comments on a proposed change in our rules to provide that material in a television station's public file may be copied, with the costs of such reproduction to be borne by the inspecting party. Our tentative view is that a simple requirement to this effect might well suffice, but we shall consider comments which suggest the need for more particularization as to the circumstances which should obtain. In view of our recent actions to revise renewal procedures as well as to establish new requirements in connection with inspection of program logs, the Commission wishes to act promptly and in a fashion reflective of these other actions. While this is not intended to foreclose consideration of views in opposition to the current proposal, parties interested in putting forth such a view should bear in mind that this Notice is not intended to function as a vehicle for reconsideration of other actions taken in this general area. Thus, such parties should explain how the view they express might be coordinated with these other actions.

4. Accordingly, the Commission proposes to amend its rules as described above and pursuant to Sections 4(i), 303(g) and (j) and (r) of the Communications Act of 1934, as amended.

5. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested parties may submit comments on or before March 7, 1974, and reply comments on or before March 18, 1974. All relevant and timely comments will be considered by the Commission before final action is taken.

6. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 14 copies of all comments, reply comments, pleadings, briefs, and other documents shall be furnished the Commission. These will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-64

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SHASTA CABLE TV, INC., MOUNT SHASTA, CALIF. SHASTA CABLE TV, INC., SISKIYOU COUNTY, CALIF. (PORTIONS CONTIGUOUS TO MOUNT SHASTA, CALIF.) For Certificates of compliance	CAC-2185 CA515 CAC-2186 CAO22

MEMORANDUM OPINION AND ORDER

(Adopted: January 23, 1974; Released: January 30, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. Shasta Cable TV, Inc. operates cable television systems at Mt. Shasta and portions of Siskiyou County contiguous to Mt. Shasta, California. The systems are located outside all major and smaller television markets and serve approximately 200 subscribers with the following television broadcast signals:

KMED-TV (ABC-NBC, channel 10)	Medford, Oreg.
KIXE-TV (Educ., channel 9)	Redding, Calif.
KRCR-TV (ABC-NBC, channel 7)	Do.
KHSL-TV (CBS, channel 12)	Chico, Calif.
KOTI (ABC-CBS, channel 2)	Klamath Falls, Oreg.
KOBI (ABC-CBS, channel 5)	Medford, Oreg.

On March 5, 1973, Shasta Cable filed applications for certificates of compliance, requesting authorization to carry the following additional television signals:

KTXL (independent, channel 40)	Sacramento, Calif.
KTVU (independent, channel 2)	Oakland, Calif.
KPIX (CBS, channel 5)	San Francisco, Calif.
KBHK-TV (independent, channel 44)	Do.

Carriage of these signals is consistent with the provisions of Section 76.57 of the Commission's Rules, and the applications are unopposed.

2. On August 22, 1973, counsel for Mt. Shasta filed amended applications in which the Commission was notified that Shasta Cable had prematurely commenced operations in violation of the Commission's Rules.[1] A further pleading, "Request for Immediate Action or Special Temporary Authority," filed on October 15, 1973, described the nature of the violation and requested the Commission either to issue certificates of compliance immediately or grant special temporary authority pending action on the subject applications. Shasta Cable admitted that it had commenced operations on December 26, 1972 prior to receiving

[1] Previous filings on behalf of Shasta Cable were submitted without the assistance of communications counsel.

certificates of compliance. In explanation of its failure to obtain certification, applicant states that Shasta Cable acted under the mistaken belief that certificates were not required because the systems were grandfathered by virtue of a February 27, 1972, unopposed notification of intended cable service, given pursuant to former Section 74.1105 of the Rules. It attributes its error to the fact that until recently Shasta Cable was without communications counsel and was not aware that activation of the systems violated the Commission's Rules. Shasta Cable also asserts that its operations otherwise are in conformance with the Rules, and any disruption of service would be financially catastrophic to it.

3. Although Shasta Cable's explanation does not justify its commencement in violation of our Rules, we note that it has voluntarily come forward and notified the Commission of its violation. Since the submitted evidence indicates that the violation was inadvertent and that the systems' carriage complement is consistent with our Rules, we believe that a suspension of service would serve no useful purpose. We have previously stated our reluctance to deny cable subscribers service because of a mistake by a system operator where no public interest consideration is involved. *Belle Glade Community Television Company, Inc.*, FCC 73–1211, —— FCC 2d —— (1973); cf. *La Fourche Communications Inc.*, FCC 73–122, 39 FCC 2d 472 (1973); *Coldwater Cablevision, Inc.*, FCC 71–793, 31 FCC 2d 17 (1971). Since carriage of the requested additional signals is consistent with Section 76.57(b), we will authorize their carriage in addition to certifying the signals initially carried by the applicant. We emphasize, of course, that intentional attempts to circumvent our rules will be met with appropriate administrative measures.

4. The franchise ordinance for Mt. Shasta was adopted on December 24, 1971, and that for Siskiyou County,[2] which incorporates by reference and adopts the terms of the Mt. Shasta franchise, on April 12, 1972. There are certain variations in these franchises from the standards of Section 76.31 of the Rules. Although the applicant asserts that the franchises were awarded after full public proceedings, there is no recitation to this effect in either of the franchises nor assurances by the franchising authorities. Both franchises specify twenty-year terms. Shasta Cable TV promises to request the franchising authorities to consider any changes in subscriber rates at a full public proceeding, but there is no recitation to that effect in the franchises. A local business office and complaint procedures are specified by the applicant, not by the franchises. There is no assurance in either of the franchises that modifications of the Commission's standards will be incorporated within one year of adoption, or at the time of the franchise renewal, whichever occurs first. According to the note to Section 76.13(a)(4), only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972. We find that the franchise issued by Mt. Shasta substantially complies with Section 76.31 of the Rules in a manner sufficent to justify a grant of

[2] The franchise area in Siskiyou County includes only those areas within a five-mile radius of Mt. Shasta's City Hall.

the Mt. Shasta application until March 31, 1977. *E.g.*, *Theta Cable of California*, FCC 73–826, 42 FCC 2d 387 (1973). However Section 76.13(a)(4) of the Rules requires that the franchise for Siskiyou County, issued subsequent to March 31, 1972, strictly comply with the Commission's franchise standards. Since it contains the same inconsistencies as the Mt. Shasta franchise, the Siskiyou County franchise is not in full compliance. As a result, it might seem appropriate to order discontinuation of the prematurely begun service in the county, pending the necessary amendments to the franchise. However, we note that the same headend serves both Mt. Shasta and Siskiyou County, and that the applicant presently has only 200 subscribers on both systems with a predicted maximum of no more than 1200. Since curtailing service in the county would also effect Mt. Shasta, we will grant the Siskiyou County system temporary authorization to continue operations for ninety (90) days from the release date of this decision, during which time we expect the system to negotiate the necessary franchise changes. Upon submission of the changes, the Cable Television Bureau will be authorized to issue a certificate of compliance pursuant to delegated authority.

In view of the foregoing, the Commission finds that grant of the subject application for Mt. Shasta, California, and of temporary authorization to continue operations at Siskiyou County, California would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–2185), filed by Shasta Cable TV, Inc., IS GRANTED, and the appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Request for Immediate Action or Special Temporary Authority" for Shasta Cable TV, Inc.'s cable television system at Siskiyou County, California, IS GRANTED for ninety (90) days from the release date of this Memorandum Opinion and Order, and the Cable Television Bureau is authorized to issue an appropriate certificate of compliance (CAC–2186) upon receipt of a franchise amended in accordance with Paragraph 4 above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 74-60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTION 83.134(f) OF THE COMMISSION'S RULES TO CLARIFY THE 1-WATT POWER REDUCTION REQUIREMENT.

ORDER

(Adopted: January 23, 1974; Released: January 29, 1974)

BY THE COMMISSION:

1. By this Order, it is intended to interpret and clarify the requirement of Section 83.134(f) of the rules for a capability to reduce carrier power to one watt or less of ship station transmitters using F3 emission in the band 156–162 MHz.

2. In adopting the one-watt or less power reduction requirement, it was our intention not to subject public correspondence transmitters used as equipment ancillary to a ship station otherwise meeting all applicable requirements to the one-watt power reduction requirement.

3. It has been brought to our attention that certain licensees—specifically operating in the Great Lakes—wish to use automated public correspondence VHF equipment to supplement the capabilities of the basic ship station. These transmitters will be operated only in the Great Lakes and used only on VHF duplex public correspondence channels. Under such controlled circumstances, the one-watt power reduction capability is not necessary and need not be required because of the unlikelihood of harmful interference being caused to ship stations of other nationalities.

4. Accordingly, IT IS ORDERED, That the additional footnote to Section 83.134(f) of the rules, which is set forth in the attached Appendix, IS ADOPTED effective February 5, 1974. The footnote clarifies the intention of the one-watt power reduction requirement to set forth circumstances under which the requirement will not apply.

5. Authority for this amendment appears in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended. Because this amendment is primarily editorial in nature and would relieve a requirement otherwise thought to apply, compliance with the public notice and effective date provisions of 5 U.S.C. § 553 does not apply.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 83 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 83.134(f) is amended by adding footnote #4 as follows:

§ 83.134 Transmitter power.

* * * * * * *

(f) Ship station transmitters using F3 emission in the band 156–162 MHz shall not exceed a carrier power of 25 watts[1][2][3][4] and, additionally, shall include the capability to reduce, readily, the carrier power to one watt[3][4] or less.

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1 * * *
2 * * *
3 * * *

[4] An exception to the one-watt requirement exists for full duplex transmitters to be used only on public correspondence duplex channels only as additional equipment to a VHF ship station while operating in the Great Lakes which is equipped with a transmitter that otherwise meets existing rules, statutes and international agreements. Type acceptance will be granted for such transmitters when used in this manner. When such equipment is used, it must be located with the principal ship station to ensure operation in conformity with the rules.

F.C.C. 73-1343

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SLEEPY EYE CATV, INC., SANBORN, MINN. For Certificate of Compliance	CAC-2681 MNO86

MEMORANDUM OPINION AND ORDER

(Adopted: December 19, 1973; Released: January 8, 1974)

BY THE COMMISSION:

1. Sleepy Eye CATV, Inc., has filed an application for certificate of compliance to begin cable television service at Sanborn, Minnesota, a community located outside of all television markets. Sleepy Eye proposes to carry the following television broadcast signals:

KEYC-TV (CBS, channel 12)	Mankato, Minn.
WCCO-TV (CBS, channel 4)	Minneapolis, Minn.
KMSP-TV (ABC, channel 9)	Do.
WTCN-TV (Independent, channel 11)	Do.
KSTP-TV (NBC, channel 5)	Do.
KTCA-TV (Educational, channel 2)	Do.
KELO-TV (CBS, channel 11)	Sioux Falls, S. Dak.
KSOO-TV (NBC, channel 13)	Do.

Carriage of these signals is consistent with Section 76.57 of the Commission's Rules and Sleepy Eye's franchise, granted April 25, 1973, conforms with the requirements of Section 76.31.

2. Station KEYC-TV, a CBS affiliate, places a predicted Grade B contour over Sanborn. Pursuant to Section 76.91 of the Rules, KEYC-TV has requested Sleepy Eye to provide network program exclusivity against other CBS affiliates that have lower priority. Sleepy Eye has requested a waiver of the provisions of Section 76.91 of the Rules, stating that: (a) the total population of Sanborn is approximately 500 people; (b) the total number of subscribers will not exceed 120; and (c) the Commission has had a long-standing policy of deferring action on exclusivity requests involving systems with fewer than 500 subscribers.

3. As we stated in *Parsen Electric Co.*, FCC 73-120, 39 FCC 2d 491 (1973), one of the policies retained in the *Cable Television Report and Order*[1] was the waiver of immediate imposition of program exclusivity requirements upon systems which had yet to obtain 500 subscribers. *See also Stark County Communications, Inc.*, FCC 73-103, 39 FCC 2d 274 (1973). In light of our past policy and the facts presented

[1] Par. 98, *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 181 (1972).

in this case, we believe that the public interest will be served if a temporary waiver is granted to the applicant's system until 500 subscribers are served.

In view of the foregoing, the Commission finds that a grant of the subject application and waiver request would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the request for waiver of Section 76.91 of the Rules, filed by Sleepy Eye CATV, Inc., IS GRANTED to the extent indicated in paragraph three above.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance" (CAC–2681), filed by Sleepy Eye CATV, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*